The SECOND PART OF CASES Argued and Decreed IN THE HIGH COURT OF CHANCERY, CONTINUED

From the 30th Year of King *CHARLES* II.
To the 4th Year of King *JAMES* II.

LONDON:
Printed by the Assigns of *Rich.* and *Edw. Atkyns* Esquires, for **John Walthoe**, and are to be sold at his Shop in the *Middle-Temple-Cloysters.* 1701.

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TO THE

Right Honourable

Sir Nathan Wright, Kt.

Lord Keeper of the Great Seal of *England*, and One of the Lords of His Majesty's most Honourable Privy Council.

MY LORD,

THE following Sheets humbly present themselves to Your Lordship's View, no ways presuming on their own Worth or Merit, but wholly confiding in Your Lordship's Goodness to accept them.

The Author (if I am rightly informed) was, when living, for many Years a Practiser of the first Rank, in that High and Honourable Court of which Your Lordship is now the Head, and greatest Ornament.

The Subject Matter being Equity, it carries something of Pretence (with Your Lordship's Pardon and Permission) to be addrest to Your Lordship, as the Fountain of Equity.

You

The Epistle Dedicatory.

You have, My Lord, *not only the Custody of His Majesty's Royal Seal, but You are the Great and Just Dispenser of the Royal Equity and Conscience; and, I hope, of Mercy too, in forgiving the Confidence of this Address.*

My Part herein has been little more than Midwifing into the World another's Orphan-Issue: And I was glad of finding this Occasion publickly to profess my self,

My Lord,

Your Lordship's Most Humble

and most Obedient Servant,

J. W.

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DE
Term. Sanct. Hill.
Anno Regis 30 & 31 Car. II.
In
CANCELLARIA.

Bland *and* Middleton.

By Will in writing J. S. seised in Fee deviseth Land to his Daughter E. and her heirs; and his mind is, if his Son A. pay to her 50 l. then his Son should have that Land; the Mony was not paid at the day appointed by the Will; the Daughter sells the Land, it was decreed by the Lord Chancellor against the Vendee, he paying the Mony, for he took it but as in the nature of a Security, though it was objected by Sir Fr. Winnington, that this is a contingent Devise to the Son on payment, and then too, if he had performed and paid, he could have had but an Estate for Life, the Remainder or Reversion in Fee to the Daughter.

Heir relieved against Wife Devisee for her Life. Devise. Condition.

Note, 'Tis no reason, that his Father should give the Son a greater Estate in Equity than the Will in writing, gives him on performance of the Condition by the express words of the Will in writing, and the Will cannot be of Land, but in writing: So as if the Testator having made such Will in writing had by Parol declared that the Son should have the Fee-simple on Payment, it should not avail; yet it was decreed, ut supra. Quære si bene.

Morley *verſus* Morley. 15 February, 1678.

Truſtee robbed.

THE Defendant was Truſtee for the Plaintiff an Infant, and received for him 40 l. in Gold, a Servant of the Defendant living in the Houſe with him robbed his Maſter of 200 l. and the 40 l. out of his Houſe. The Robbery, viz. That the Defendant was robbed of Mony was proved; the Sum of 40 l. was proved by only the Defendants Oath.

Lord Chancellor. He was to keep it but as his own, and allowed it on account; ſo in caſe of a Factor, ſo in caſe of a perſon robbed, for he cannot poſſibly have other Proof.

Anonymus. 25 February, 1678.

Damage for Legatee. Demand tho' no Relief by the Bill.

A Suit was begun for a Legacy and to diſcover Aſſets, no Aſſets ſufficient being diſcovered; after other Aſſets came to the Executors Hands, and a ſecond Bill for the Legacy, and Aſſets thereon diſcovered, and the Lord Chancellor gave Decree for the Legacy, and Damages from the firſt Bill exhibited; for that was a good demand of the Legacy, though it was not preſented and not only from time of Aſſets.

DE

DE
Term. Sanct. Mich.
Anno Regis 32 Car. II.
In
CANCELLARIA.

Bevan *verſus* Dike. 27 Novemb. 1679.

THE Plaintiffs Wife and Adminiſtratrix to her Husband ſues Dike Mortgagee of a Dye-houſe and Veſſels, but the Adminiſtration was repealed becauſe ſhe was married, and it was ſaid at the Bar, that ſhe was ſo ſentenced becauſe ſhe was married by a Non-Conformiſt Miniſter: But it was but ſaid, and to that ſaying the Chancellor ſaid it might be allowed as well as by a Romiſh Prieſt, or he ſaid to the like effect; but nothing proved. The Cauſe being heard, the Court in regard of the Repeal of the Adminiſtration could not relieve her, but in the proof it appears ſhe had another Title not ſet forth in the Bill nor put in the Iſſue, viz. That the Mortgageor before Witneſs gave 2s. 6d. to the Heir and declared, that the Plaintiff ſhould ſell the Houſe, pay the Mortgage, and with the Houſe and Trade of Dying maintain her ſelf and Children, ſo that it was a Parol Declaration of a Truſt. Relief on Matter not in Iſſue.

Object. It is not alledged nor in Iſſue, therefore, &c.

Chancellor. Where I ſee Right I will have it tried ere I decree againſt it, and it is no inconvenience, for the inconvenience is becauſe the other ſide cannot examine to what is not alledged, but at the Trial he may, and ſo directed a Trial on that Point.

Anonymus. Novemb. 27. 1679.

Heir helpt against Wife Deviſee. Diſcovery.

THE Husband deviſed Lands in queſtion to his Wife for Life, the Son exhibits a Bill pretending the Deviſe to the Wife void, becauſe 27 Eliz. the Lands were entailed to his great Grandfather, to whom he was Heir in Tail; and to diſcover the Deed in Tail, the Wife confeſſeth Writings in her hand; ſhe is ordered to bring in all the Writings, and it fell out that the Deed of Intail was among the reſt. The Heir by a Motion ex parte gets all the Writings out of Court, and, on Motion after was ordered to bring them in again, and they are now in Court.

At the Hearing Mr. Keck prays that the Heir may not make the Court an Inſtrument to help the Heir to the Deeds, but that ſhe the Defendant may be in the ſame Condition as ſhe was before the Writings brought in by her in Obedience to the Court, for though the Deviſe was voluntary and not in purſuance of Articles in Marriage, yet unleſs the Heir would confirm her Eſtate, ſhe ought not to be aſſiſted by the Court, for there is a Conſideration (to wit) to provide for his Wife, and ſo had it been if the Father had in like manner deviſed to younger Children, for the Conſideration in Law is good, (Wife) to raiſe a Uſe at Common Law.

He affirmed there were Preſidents for him, and the rather, becauſe the Father had power to bock or bar the Intail.

Chancellor. I will never help the Iſſue againſt a Purchaſor, but here it is a Bounty in this Caſe, and in ſuch Caſe the Heir having a good Title ſhall be aided; and decreed the Deed to the Plaintiff.

Anonymus. Novemb. 27. 1679.

Real Eſtate made liable in lieu of the perſonal.

THE Caſe was. The Father ſeized in Fee mortgaged the Land and gave a Statute to the Mortgagee to pay, &c. and made his Will, and deviſed 500 l. to his Daughter and died, the Mortgagee took ſo much of the perſonal Eſtate in Execution on the Statute that thereby there was not ſufficient Aſſets left to pay the Legacy.

The

The Question was now that the heir was discharged or eased of the Debt out of the personal Estate liable to the Legacy; if now the Daughter should have relief against the heir, who was eased out of the personal Estate which was liable to her Legacy; and it was decreed for her.

V. Gilb. C. 309.

Heir Executor.

Chancellor. Where the heir is indebted by Mortgage made by his Father, or by other means as heir to his Ancestor, the personal Estate in the hands of the Executor shall be employed to pay that Debt in Case of the heir: but if there be not Assets to pay other Creditors or other end of the Testator on his Legacies, the heir shall not turn his Charge on the personal Estate. In this Case here was sufficient to pay the Debt by the Mortgage, &c. and the Legacy out of the personal Estate, and when both can be satisfied both shall be satisfied; and the Contrivance to make the personal Estate liable to the Legacy towards satisfaction of the Mortgage (looks like a Fraud) and shall not prejudice the Legatee, but she shall have recompence against or upon the Mortgage though originally not liable to her. And my Lord cited several Presidents decreed upon the same reason.

Management of the Estate.

Legate *versus* Hockwood. Nov. 27. 1679.

Mony secured by Bond discharged the Assurance denied on Demand. Consideration. Assurance.

THE Plaintiff bought of the Defendant five sixteen Parts of a Ship, which he had formerly sold by Bill to the Plaintiff, and gave him Bond for the Mony, and after the first Bill kept the Bill, saying, he would keep it till he were paid, and being after requested to make a Bill of Sale to the Plaintiff, refused to do it; the Plaintiff pleads, that by reason thereof he could not dispose of his Interest, for though he had Title by the verbal Sale, yet none would deal with him on such terms without a Bill of Sale to make out his Title, but he did not instance in any particular person, who refused to deal with him: The Plaintiff sent the Ship to Sea, which made a losing Voyage, at her return to England, the Defendant then proffered a Bill of Sale, but the Plaintiff refused it, and now sues to have up his Bond though he had not paid the Mony.

Chancellor. When the Ship was sold it is implyed, that the Vendor should make Assurance by Bill of Sale, but not unless it be demanded: Was it demanded?

The

The Council for the Plaintiff read and proved a Demand.

Keck. Here is a Bargain executed, Security for the Mony given, Poſſeſſion taken by the Plaintiff, and the Ship employed by him and ſafe returned, and we pray to have our Mony according to Security to us for our Ship given, which he hath.

Chancellor. When you had Security you ought on Demand to have made Aſſurance; if a Man buy Lands and ſecure the Mony, if he who ſells will not make Aſſurance, when reaſonably demanded, he ſhall loſe the Bargain, therefore decreed the Bond to be delivered up and the five Parts, &c. reaſſigned to the Defendant.

Faſhon *and other Creditors of* Anthony Pearſon *deceas'd, Plaintiffs, againſt* Atwood *Executor, and* John Atwood *and againſt the Debtors of* Anthony Pearſon *and* Ralph Pearſon *Adminiſtrator* de Bonis *of* Anthony Pearſon *Defendants, On the Hearing* 4 December 1679. *The Caſe was.*

Parol Aſſignment of Debts.

JOhn Atwood a Merchant in Norwich, deceaſed, imployed Anthony Pearſon deceaſed, as his Factor in London, to ſell Stuffs for him, and did charge him with great Sums of Mony by Bills of Exchange, many of which Pearſon accepted, and finding that he had accepted more Bills than Aſſets to ſatisfie, complained thereof to Atwood, who thereupon willed him to go on, and agreed that he ſhould ſell the Goods, and diſpoſe of Goods and Debts as his own to ſecure himſelf; which he did, and ſold to the Defendants, and entred them in his Accounts in his own Name, and the Buyers (ſome of the now Defendants) knew not whoſe Goods they were but bought them of Anthony Pearſon; two days after the Agreement John Atwood, the Merchant, died; afterwards Anthony Pearſon, the Factor, aſſigned thoſe Debts ſo contracted to Packer, another Defendant, to the uſe of the Creditors of Anthony Pearſon, and dyeth. The Scope of the Bill was, That accordingly the ſaid Debts may be employed to the uſe of the Creditors of Anthony Pearſon according to the Aſſignment.

B. At-

B. Atwood, Executrix of John Atwood, oppoſed it for that ſhe was ſubject to Demands of divers perſons by Bond, which Debts by Bond are to be paid before any Debts by verbal Agreement; and though Pearſon ſold the Goods of Atwood to the Defendants, yet Atwood might ſue for the Debt in his own Name (which was not denyed) and though in Atwood's Life-time he could not avoid his Agreement, yet the Caſe is altered by his death; for himſelf was equally lyable to his verbal Agreement as his Bond; but the Executor is not ſo, for he muſt pay Bonds before ſimple Contracts.

It was ſaid for the Plaintiff. Debts though not aſſignable in Law are on good conſideration aſſignable in Equity, and though the property of the Debt be not altered, yet it binds Atwood, the Aſſignor, and conſequently his Executor: So as the one nor other can avoid it in Equity, and there is no danger of Devaſtavit to the Executor; for it cannot come to the Executors hands, for the Executor is bound by the Aſſignment as well as the Teſtator, and till it come to his hands the Executor cannot be charged.

The Attorny General objected. The Creditors by Bond are now concerned, for they ought to be preferred before a verbal Agreement, and the Executors for them in their behalf.

The Chancellor ſeemed to incline much againſt the Plaintiff, but directed a Trial on this Point, viz. If there were any Agreement between the Factor and Merchant, that the Factor ſhould have the Debts for his Security.

It was inſiſted on as a Cuſtom between Merchant and Merchant that all Accounts ſhould be evened on either ſide by way of Eſtoppel, when the Buſineſs was of the ſame employment, &c.

Temple *contra* Rowſe. Decemb. 8. 1679.

A Decree was made, and before Coſts tared, the Plaintiff died, and a Bill of Revivor brought and diſallowed by the Lord Chancellor, On Plea que ne giſt pour coſts. No Revivor for Coſts only.

Wakelin

Wakelin *contra* Walthal. Decemb. 8. 1679.

Verbal Agreement no stay to Execution of a Decree.

A Decree being past, the Defendant to a Bill to execute the Decree, set forth a Parol Agreement in Bar; to which Answer the Plaintiff demurs, and the Chancellor allowed the Demurrer though the Agreement were subsequent to the Decree; the Decree shall proceed, and if the Defendant will have advantage of the Agreement, let him bring an Original Bill, for if he have advantage by it in way of defence, one witness may serve his turn, but to an Original Bill here if he in his Answer deny the Agreement, one witness will not convict him, so as by this way of Answer the Plaintiff should lose the benefit of his Answer.

Anonymus. 9 Decemb. 1679.

Stat. Car. II. Will.

Devise.

Mortgagor after Forfeiture by Will in writing since the Statute, and attested only by two witnesses, devised the Land, and upon Tryal a Verdict against the Validity of the Will; for the Question at the Trial was not on the Point of Equity, whether the Equity of Redemption passed by the Will, but whether the Lands passed, the Mortgage being then unknown, but discovered since?

And now Mr. Eccleston moved, That this is not within the Statute which nulls such Wills only in case of Devise of Lands by vertue of the Common Law, Statute or Custom, but a Devise in Equity is not good either of those ways.

Chancellor. I cannot tell that, but before the Statute if a Mortgagee before the Condition broken devise, &c. it is void, for a Condition is not deviseable, but after Forfeiture the Equity of Redemption is deviseable.

A

Hodges

Hodges *contra* Waddington. 11 Dec. 1679.

THE Question and Case was. An Administrator possesseth himself of the Intestate's Goods, and deviseth Legacies and dyes, his Executor voluntarily without compulsion of Suit pays the Legacy, there then being a Suit in right of the Intestate, to recover the Goods, and after that the Goods are evicted from the Executor; so that now he hath not nor truly had Assets for the Legacy: The Executor sues to have back from the Legatee what he paid, and in truth was not bound to pay, but voluntarily did.

Executor, pending a Suit for the Estate, voluntarily pays a Legacy, the Estate is evicted, he is remediless. Executor. Eviction. Loss.

The Lord Chancellor advised: But in the same day in the Afternoon the Lord Chancellor dismist the Bill, because the Executor paid the Mony voluntarily without Compulsion by Suit. And 2dly, with his Eyes open when he knew that the Estate was in question, so he was aware of the danger of the Action. If the Suit for a Legacy be in the Ecclesiastical Court they make the Legatee give Security, because when the Legacy is paid they cannot restore, &c. And here the Court decrees a Legacy without Security (unless in case of Poverty or the like) for this Court can reach the Legatee again if there be cause.

Trethewy *contra* Hoblin.

TRethewy purchases of Francis Hoblin, Son and Heir of Thomas Hoblin, Lands called Bawdo, and by another Purchase purchases Penhale Prideaux, and had Mortgage of Penhale sans addition, and Penhale Hungerford, the Purchase-mony and Debt 3000 l. the Estate of Penhale and Hungerford was in Reversion after a Jointure to old Hoblin's Wife.

No Costs of Trial if the Title not good, but probable.

Trethewy's Bill was against Thomas Hoblin, the younger Son, and Hawky an Attorney. The Equity was to discover Incumbrances, examine Witnesses, have up the Evidences and Writings, which the younger Son being Executor to his Father hath, and to be inabled to try the Title, which he could not do without aid of this Court during the Jointress's Life.

A Trial was in Devon for Penhale, but ſet aſide on Certificate of the Judges coram quo, &c. And a new Trial in Banco Regis by a Jury of Middleſex touching Penhale, which paſt againſt Trethewy, and a Trial for Bawdo, which was claimed by Hawkey, which paſt for Hawkey.

The Cauſe was now heard again 16 December, 1679.

The Point in debate was, Whether Trethewy, who had loſt his Money and Security, and had a probable Cauſe of Suit, ſhould pay Coſts at Law or here?

The Lord Chancellor ordered not any, but the Defendant might enter Judgment at Law, but no Coſts there.

Green & Mary *Uxor*, *contra* Hayman, &c. 19 December, 1679.

Eſtates tranſpoſed to maintain the intent of the Will. Deviſe.

THE Caſe was. George Rook, Grandfather of Mary, ſeized in Fee, deviſed the Lands in queſtion to Lawrence his Son, Father of Mary the Plaintiff, and alſo of the Defendant Hayman Rook for the Life of Lawrence only, Remainder to the firſt Son of Lawrence, and the Heirs Males of ſuch firſt Son, and ſo to the other Sons in præfat' terminis; the Remainder to John Brown and Lancelot Johnſon, &c. for their Lives on Truſt and Confidence on them repoſed for the better ſecuring of the ſeveral Remainders before limited; the Teſtator died, Lawrence before any Son born, by Leaſe and Releaſe makes J. S. Tenant for his Life, and ſuffers a common Recovery to the uſe of himſelf again for Life, and a Remainder for years to the Truſtees to raiſe 1000 l. Portion for his eldeſt Daughter, and then afterwards hath Iſſue the Plaintiff Mary and the Defendant Hayman Rook, his Son and Heir, and dieth. The Suit is for the 1000 l.

The Defence by Plea was, That Brown, &c. the Truſtees, to preſerve the Contingent Remainders to the firſt, ſecond, &c. Sons are living, and conſequently the Eſtates contingent not barred by the Recovery.

Againſt which it was objected, that Lawrence, till a Son born, was Tenant in Tail, and the Eſtate to Brown, &c. a Remainder after, and not before the Entail to Lawrence, and

and ſo is barred by the Recovery, and could not preſerve it ſelf, a fortiori, not the contingent Remainders precedent.

After Debate the Lord Chancellor allowed the Plea, for the Law will manage and marſhal the Will according to the intent, which here was to preſerve Contingent Eſtates limited in place after the Contingencies; but if it ſo ſhould ſtand in Conſtruction of Law it cannot preſerve them, therefore clearly ſhall be conſtrued before them.

William Melliſh, *Eſq; Plaintiff, the Royal* African *Company and* Richard Edlin, *Defendants.*

The Caſe.

IN October, 1672. the Company choſe the Plaintiff to be their Agent-General and Preſident of their Council at Cape Corſa in Africa, which Council was to conſiſt of the Agent-General, and a firſt Merchant, and a ſecond Merchant; the firſt Merchant was to be Gold-taker, the ſecond Merchant Warehouſe-keeper, and the Plaintiff was to have a Sallary of 400 l. per annum, two third parts of which was to be paid in Africa, and the other third part in England, when the Company had allowed his Accounts; and the Company gave the Plaintiff an Eſtabliſhment or Rules by which to guide himſelf. And by which the Out-Factories were alſo to be guided, by which Eſtabliſhment the Out-Factories were to ſend their Accounts to the Company of all their Tranſactions, and gave the Company Security to be accomptable to them for all what they received and paid for them. And the Plaintiff and Council were alſo to take the Accounts of the Out-Factories and enter them in their Books, which were kept for the Company at Cape Corſa Caſtle. Merchants of the *African* Company.

All the time the Plaintiff was there (which was three years) the Defendant Edlin was (for want of a third perſon) both Gold-taker and Warehouſe-keeper.

The three years being ended, the Plaintiff and Edlin came home, and having delivered up his Accounts and Papers to Mr. Hodgkins his Succeſſor at Cape Corſa, ſent the Company according to their Eſtabliſhment juſt Accounts from time to time of all their Tranſactions.

The Plaintiff expected the Remainder of his Sallary, but the Company su'd him at Law for all their Goods sent, and got Judgment (Quod computet.)

To be relieved against which Suit, and have the Remainder of his Sallary is the Scope of the Bill.

13 July, 1675. The Cause came to be heard, and decreed,

1st. That the Plaintiff should account with the Company as their Agent-General in the said Trade at Cape Corsa Castle.

2dly, That Edlin should be admitted Warehouse-keeper throughout the Plaintiff's Agency.

3dly, That in making the Account the Plaintiff is to be discharged of all Goods delivered into the Warehouse at Cape Corsa Castle, and that went to the Out-Factories and were delivered there, or that were not delivered there through the default of the Master of the Ship, or any other accident.

4thly, That the Plaintiff should be charged with all Goods belonging to the Company, which he or any by his Order took out of the Warehouse and disposed of; and with all Goods that went to other Factories which were afterwards imbezilled by him or his Order, or for his Use.

5thly, That the Plaintiff should be charged with such of the Companies Goods as came to Cape Corsa Castle, and were not delivered into the Warehouse, nor consigned to any other Factory, but came to the Plaintiff's hands or use.

6thly, And if any Goods came to any Out-Factories and Product had been answered the Plaintiff, and he hath not answered it to the Company, the Plaintiff is to be charged therewith.

7thly, And that in this and all other matters of the Account, wherein the Plaintiff is charged he shall not be allowed any thing in discharge, but what he proves.

And that in all Cases not before directed where Edlin may be charged, the Plaintiff is to be discharged.

That this Order was entred according to the Minutes, and the Defendants acquiesced under the Decree so far as to bring in their charge before the Master, and accepted a Discharge, and took a Warrant to attend the Master on the Discharge.

But

But inſtead thereof petitioned the Lord Chancellor to reäiſe the Order, and would have the Plaintiff charged with the Monies demanded by the Out-Factories in their Accounts which they ſent the Plaintiff during his reſidence at Cape Corſa, the Petition alledging that near 1000 l. is demanded by the Plaintiff in his accounts in groſs for Charges allowed by him in the accounts of the Out-factories without the producing the Vouchers.

In anſwer to this Petition, the Plaintiff ought not to be charged with the Demands of the Out-Factories, for he knows not nor is concerned whether thoſe Demands be juſt or unjuſt, nor can he allow or diſallow of them, but muſt take them as they were given; and if they are falſe accounts the Out-Factories are liable to the Company, to whom they by the aforeſaid Eſtabliſhment are to account and give Security ſo to do. *Vide* the 13th Article in the Eſtabliſhment to prove the Company did direct the Underfactors ſhould all account to the Company in *England*, of all Goods they received and ſold, and ſend to the Company by every Ship a Copy Journal of all the Proceedings; and notwithſtanding that accounting to the Company in *England* they were to account to their Agent and Council at *Cape Corſa*, ſo as they might inſpect all their Acting, and keep perfect Accounts with them in the Companies general Books at *Cape Corſa*. *Vide* the Securities the Company uſually took of all their Factors in *Guinea* being in their Cuſtody.

2. Its not reaſonable to charge the Plaintiff with what he never received, for the Out-Factories returned him no more Effects than what came clear after the deduction of their Demands, which deductions were made by themſelves, and not by the Plaintiff; nor could the Plaintiff and Council at Cape Corſa refuſe ſuch Effects as they ſent or brought thither, if they had, the Company might have complained for that cauſe.

3. As to the Allegation of the Petition that the Plaintiff demands groſs Sums for Charges allowed in the Out-Factories accounts, there is no ſuch thing, the Plaintiff making no demands; there being only entered according to the Companies ſaid Eſtabliſhment in the Books kept at Cape Corſa for the Company the general and total Sums demanded by the Outfactories for what they diſburſed, nor is there any occaſion for the Plaintiff to make any ſuch demands, for being not chargeable with what Goods were ſent to and received by the Out-Factories, he cannot be charged with their diſpoſal of them, and ſo hath no occaſion to demand any ſuch allowance.

4. As

4. As to the charging these accounts in the Companies Books kept at Cape Corsa Castle in gross Sums it was no Crime in regard it was the usage, and also for that by the Company's said Establishment the Out-Factories were themselves to render an account of all their Recipts and Payments, and for that purpose gave Security as aforesaid to the Company, and the Plaintiff and Council had the Vouchers at Cape Corsa Castle when these Sums were entred.

5. And as to the Objection, that the Out-Factories accounts themselves are not produced, the Company by their Letter dated 25 January, 1675. gave Mr. Hodgkin's Order to take from the Plaintiff and Edlin all their concerns; whereupon never having any Order to bring them or send them to the Company, and seeing the Companies Order, delivered up all the Out-Factories Accounts and Letters which were many thousands, to Hodgkins, who was proper to have them that he might see how matters stood; which Papers were, since the Plaintiff came to England, burnt by one Croxton the Company's late Agent, with which the Company being not satisfied, petitioned the Lord Chancellor for these accounts, who the 22d of March last ordered that the Plaintiff should swear he left them with Hodgkins which should conclude the Company, which the Plaintiff had done. Vide Order and Affidavit.

Company's Letter to Agent *Hodgkins* to prove this Order. *Ja. Nightingale* proves the burning of the Papers

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Term. Sanct. Hill.
Anno Regis 31 & 32 Car. II.
In
CANCELLARIA.

Bodly *contra* ——

BOdly gave Bond of 500 l. to the Brother of the Defendant, conditioned to pay to the Defendants Sister (Party also to the Bill) 50 l. and to maintain a base Child paying a certain yearly Sum for it. There was no place in the Condition where the 50 l. should have been paid. The Plaintiff by his Bill offers Payment of the 50 l. and brought it into Court, and the Defendant set forth by answer that the Plaintiff was Suter to her in way of Marriage, but abused her and left her, and thereupon the Court refused to grant an Injunction to the Plaintiff against the Suit on the Bond; the Plaintiff replyed and acknowledged he was a Suter, and really intended Marriage, but that after he had begun to woe the Woman, he was informed, as the truth was, that she had formerly been taken in a Bed with another Man, and that this was known publickly, and her Father trepanned him to woe her, &c. he being a young Man in Oxford. Yet now the Lord Chancellor denied the Injunction saying, this Court should not be a Court to examine such Matters.

Iniquity takes away Equity.

Winkfield

Winkfield *contra* Combe. 1679.

Accident Teſtament.

F. Winkfield having a Son and other Children married the Plaintiffs Mother, and five years before he died made his Will, and taking notice therein that his Wife was enſeint, deviſed 1000 l. to the Plaintiff; and if the Child en ventre ſa mere were a Daughter, then ſhe ſhould have 1000 l. but if a Son, then that his Executors ſhould purchaſe 100 l. per annum, and ſettle the ſame on the Son and his heirs Males of his Body, and if he died without ſuch Iſſue, to the Plaintiff; the Wife is brought to bed with a Son who dyed in the Life-time of the Father, then the Father died and his Wife enſeint with a Daughter to whom no Portion was left or other Proviſion. And the Plaintiff exhibits her Bill to have the Land purchaſed and ſettled on her, for if Lands be deviſed in Tail the Remainder over, the Deviſee dieth without Iſſue, the Remainder ſhall take place, and there is the ſame reaſon here.

Chancellor. In caſe of a Deviſe I cannot help where the Law fixeth the Eſtate, but if you come to have relief in Equity and there falleth out an unſeen accident, which if the Teſtator had foreſeen, he would have altered his Will, I ſhall conſider of it; here he meant in caſe he left a Daughter born after his death ſhe ſhould have been provided for; and though it happens that his Wife had no ſuch Daughter (viz. whereof his Wife was enſeint at the time when he made his Will, and to which Daughter only the words of the Will extend) yet here is the ſame in effect. A. having only a Daughter deviſed his Truſtees ſhould convey the Land to the Daughter in Fee, the Teſtator recovered and after had a Son, the Daughter ſhall not carry the Land from the Son. And now the Lord Chancellor directed a Bill to be brought whereto the Poſthuma Daughter ſhould be a Party, and both Cauſes to be heard together.

Anonymus.

Anonymus. *The ſame Day.*

Where the Agreement for a Marriage, which ſhortly, viz. within ſeven weeks was had, but in the interim the young Man had made addreſs to another, but the Agreement was reduced into writing and not ſealed, and was ertream, that the Daughter and her Husband would have more than the Father (indebted) and the Mother, and two other Daughters unpreferred would have left. Unreaſonable Agreement not decreed.

The Lord Chancellor did not decree the Agreement, but if the Plaintiffs could recover at Law he would leave them to that remedy: It was referred to the Parties to agree among themſelves elſe to attend again.

Elton *contra* Waite *and* Harriſon. 18 Febr. 1679.

The Lady Anderſon Grantee of an Annuity for Years, made her Executor, who married Harriſon, he being indebted to Waite and others, agreed with Waite to aſſign the Annuity to him for Security, and the Grant of the Annuity was delivered to Pluckoet, a Scrivener, to draw the Aſſignment, but before it was perfected the Executor died; the Plaintiff took Adminiſtration de bonis non, and ſueth for the Arrears the Grantor, and the other Defendants for the Deeds, and had a Decree accordingly, though it was objected, that the Husband had power to grant and alter the property; and this Agreement was in Equity, an Adminiſtration, and the Defendants had paid ſome of his Debts in confidence of performance of the Agreement. Agreement of the Husband of the Executrix binds not. Executor.

Lloyd *contra* Philips.

A Decree in the Marſhes to account, and the Bill here to be relieved, becauſe the Witneſs is out of the Juriſdiction; but upon Demurrer diſmiſt. Juriſdiction.

Note, Witneſſes examined upon the account below.

The Attorney-General *contra* Combe. Friday 27 Febr. 1679.

Charitable Uſes.

J. S. ſeiſed of Land in Fee by his laſt Will in writing deviſed 10 l. per annum for ever (ſo long as there ſhall be a weekly Sermon every Saturday in St. Albans, to be choſen by the greateſt part of the beſt Inhabitants) out of all his Lands in D. he being alſo ſeiſed of Lands pur auter vie, as to the Party who ſhould have the 10 l. 2dly, what Lands ſhould be charged with it, and whether the Arrears ſhould be paid becauſe no Sermon hath been had on Saturdays for many Years, was debated; and the like for a Lecture in Hamſteed, &c.

It was objected that theſe Bequeſts were not within the Statute of 43 Eliz. which makes appointments to Charitable Uſes therein mentioned good, and appoints them to be executed by the Commiſſioners, and therefore are not good by the Common Law, if the Deviſe it ſelf, whereby they are raiſed, be not good, and here the Deviſe is to no perſon, and part of the Land intended to be charged was but an Eſtate pur auter vie, not deviſeable, and is deviſed no longer than while a Sermon weekly, which hath not been there of long time.

Chancellor. So long as ſhall be is ſo long as may be. 'Tis true, a Lecture is not within the Statute of 43 Eliz. but the Statute of 43 Eliz. took pattern from 1 E. 6. made to take away Superſtition, and both make uſe of the ſame Expreſſions, when it is to advance true Religion and Charity, viz. Given, Limited, Appointed, &c. Summa eſt ratio quæ pro Religione facit. In this Caſe there was Charity, but it is Charity miſtaken, to be choſen by the greateſt part of the beſt Inhabitants which is a wild direction, &c. He cited the Caſe where a Gift was to maintain a Superſtitious Inſtitution ſo long as the Law would allow, turned, when the Law did abrogate, that Superſtition to a good uſe, and decreed that the 10 l. per annum ſhould be to maintain a Catechiſt there to be approved by the Biſhop; and the Arrears from the time of the Reſtoration of the King to be imployed in purchaſe of Lands to better the Maintenance, and the Lands pur auter vie to come in proportion with the reſt; Vide the Order for the

the Annuities to maintain Lectures are thereby also decreed.

1. One Charity devised another devised.
2. A void Devise to Charity not within 43 Eliz. decreed.
3. Lands pur auter vie devised to Charity decreed tho' the Charity not within 43 Eliz.

Perne *contra* Oldfield.

CHapman seised of the Rectory of Crowland in Com. Linc. 11 Jac. conveyed the same to the use of such persons as should be lawfully appointed to serve the Cure of Crowland for ever. Curate not removeable. Postea.

The Church is impropriate ab antiquo, and no Vicar instituted.

The Statute of 18 Car. 2. enables Gifts, &c. to Curates; the Heir of the Donor names Perne for Curate; Oldfield is named afterwards and instituted, but it was pendente Lite, but now said that there being several Owners, &c. Oldfield was put in by another and the Plaintiff is revoked.

Chancellor. By the Ecclesiastical Law no Man ought to be ordained sine titulo, that there might not be mendicant Preachers; and I distinguish between Curates where the Church is become Lay, by Impropriation, and where not; for the Curate once put in and having a certain Maintenance he shall not be native, and removeable at pleasure, for that were to lay a foundation of Simony for ever.

Quære, If this reason go not to Bonds made to resign, &c.

Anonymus. 1679.

A Sells to B. with Covenants only against A. and all claiming by, from or under him. B. secured the Purchase-Mony, but before payment the Land was evicted, but not by any Title under A. but by a Title paramount. B. sued to be relieved that he might not be forced to pay seeing the Land was lost, and was relieved by the Lord Chancellor ex relatione Churchil. Mony stopt because Land evicted from the Purchasor. Covenant. Eviction.

Note. 1ſt. If Declaration at the time of the Purchaſe treated on, that there was an Agreement to extend againſt all Incumbrances not only ſpecial, it could not have been admitted.

2dly. The affirmative Covenant is negative to what is not affirmed, and all one as if expreſly declared, that the Vendor was not to warrant but againſt himſelf, and the Vendee to pay becauſe Security abſolute without Condition.

3dly. Quære, if this may not be made uſe of to a general inconvenience, if the Vendee, having all the Writings and Purchaſe, is weary of the Bargain, or on other reſpects ſets up a Title to a Stranger by Colluſion.

Nota. In many Caſes it may eaſily be done, &c.

Blackſton *contra* Moreland. 1 March, 1679.

Mortgage.

Porter had an Annuity charged on the Manor of, &c. Moreland had an Eſtate in the Manor liable to the Annuity; Blackſton had an Eſtate ſubſequent to both by way of Mortgage; Moreland having no notice of Blackſton's Intereſt treateth with him in the Reverſion in Fee, who deſired to borrow Money of him, and thereupon he agrees and purchaſeth Porter's Intereſt, and for that and Money lent to the Reverſioner, buys in Porter's Intereſt, and pays 900 l. part to Porter, part lent to the Reverſioner, there being no more than 500 l. due to Porter.

The Queſtion was, whether between Moreland and Blackſton (who now exhibits his Bill to pay off Porter and Moreland their Debts) he ſhould pay more than was due to Porter, more than 500 l. and the Mortgage Money due to Moreland. He is decreed to pay the whole 900 l. but otherwiſe if Moreland had notice of Blackſton's Incumbrance.

A Grosvenor

Groſvenor *Plaintiff*, *and* Cartwright, *Adminiſtratrix of* Thomas Cartwright, *Defendant*.
3 March, 1679.

Reſolved and Decreed by the Lord Chancellor.

An Executrix or Adminiſtratrix receives in Mony, which was ſecured to the Teſtator, if ſhe lend it out to Profit, ſhe ſhall not account for the Profit, for ſhe lends the Principal at her hazard, ſo that if it miſcarry ſhe ſhall make it good to the Eſtate.

Intereſt. Executrix calls in and receives a Debt well ſecured, ſhe ſhall not pay Intereſt, tho' ſhe lends it out on Profit

A difference was endeavoured to be put on this Rule, viz. That where the Debt was paid in by the Creditor without her Compulſion, there ſhe ſhould not anſwer Profit made by lending it out again; but where the Mony was lent by the Teſtator on good Security, and ſuch Security continued good, and the Executrix calls in the Mony and lends it out again, that there ſhe ſhould anſwer the Profit ſhe made; for it was her voluntary act, and is in effect to deprive the Children of the benefit of the Mony, till the Infants come of age, and turn it to her ſelf, which being for a great Sum, as in this Caſe it was for many thouſand pounds, will be great gain to the Executrix, and loſs to the Children for whom in effect ſhe is truſted; this was earneſtly preſſed: But

The Lord Chancellor. It is a fixed Rule of the Court and I will not change it; but ſhe ſhall forthwith diſcover what Monies ſhe hath, or hath received of the Eſtate on ſuch Security or otherwiſe, and for the time paſt ſhe is not to be charged, but ſhall hereafter lend none of the Mony without leave of the Court; and ſuch Monies as ſhe hath lent ſhe ſhall diſcover the Securities to them, and if they like them, and ſo declare their acceptance, you ſhall have the future Profits of the Mony lent, elſe not.

The courſe of the Court.

If the Plaintiff reply to an anſwer, and without rejoyning and giving Rules for publication bring the Cauſe to an hearing, the Anſwer ſhall be taken wholly true as if there had been no Replication, for the opportunity which the Defendant hath to prove his Anſwer is taken from him.

Simpſon

Simpſon *and* Field. 3 Martii, 1679.

The Caſe.

A Surety not bound by Law ſhall not be bound in Equity.

J. S. was indebted to J. D. by Bond of 1600 l. to perform an Award; by the Award was due 250 l. to the Obligee. J. D. put the Bond in Suit againſt J. S. A Bill is exhibited here to be relieved againſt the Suit, and an Injunction awarded on Recognizances to abide the Order on Hearing. Field and the Obligee are bound in the Recognizance, which was penned to pay what ſhould be reported due by N. H. a Maſter named in the Defeazance or Condition; but the Maſter died before any Report made, and ſo alſo did the Obligee, who died inteſtate worth nothing: By the ſtrict penning of the Defeazance the Recognizance is not liable at Law, becauſe no Report was made by the Maſter. The Obligee, becauſe he could not proceed in the Cauſe without reviving the Suit, which was abated by the death of the Obligee, who was one of the Plaintiffs in the Bill, procured Adminiſtration of the Obligee to be taken in the name of a poor Fellow, and in his name revived the Cauſe, and brought the Cauſe to an Hearing, and a Reference to a Maſter to take account of the juſt Debt, who reported 300 l. due.

The Queſtion was, if the Sureties ſhould be charged: 'Twas objected that this is a manifeſt Fraud and Practice of the Obligee to bring a Charge on the Surety, who was not bound by Law; and the Practice is plain, for the Reviver is by the Adminiſtrator, which no Man would do to charge himſelf; but this was anſwered and every day done when a Cauſe cannot proceed for want of Parties, viz. Adminiſtrator, &c. to take Adminiſtration, &c.

But the great Queſtion was, if the Surety, who was not liable in Law, ſhould be made liable in Equity, for the Plaintiff had good remedy for a juſt Debt, and juſtly proceeded to recover it; but the Court ſtaid his Suit, and takes ill Security, which proves ſo, and the Debt loſt thereby, and therefore the Court is bound to do us right; and the intent of the Court was, that the Debt, if due, ſhould be ſecured; and the intent was not with reference to this or that Maſter's Report, for ſuppoſe that the Court had during the Life of the Parties transferred the

Refer-

References to another Master, and he had made a Report, that should have bound; and in case of a Bond lost this Court have made a Surety to pay it. Yet the Lord Chancellor contra; for the Party is but a Surety not bound by Law.

Bromley *contra* Hamond. 4 March, 1679.

THE Father and Mother Tenants for Life, the Remainder to the Son in Tail by Marriage Settlement on great consideration, the Father and Mother mortgage the Lands to J. S. in Trust for one Marshal a Scrivener; the Father, as was alledged, made Oath before the Mortgage that he was seized in Fee; the Father died, Marshal doubting or finding his Security bad, gave 20 to one to procure the Son to borrow 100 l. of him, but did not at all discover that the 100 l. was his; the Son did borrow the 100 l. and mortgages his Lands for it, and this was conveyed to J. S. who had the Father's Mortgage, and the 100 l. not being paid a Bill is exhibited to foreclose the Son of Redemption, which was decreed; then Dr. Mills purchaseth by way also of Mortgage; the Son after the day appointed by the Order to pay the 100 l. renders it with damages, but was refused. The Decree was inrolled, but that was done with such speed that the advantage thereof was waved.

Mortgagee lends more Mony on a second Mortgage, the first being bad.

And now the Matter insisted on was, that the first Mortgagee having a defective Assurance, now having gained a good Title in Law to the Lands, and the Plaintiff having no Title at Law ought to redeem both Mortgages, and pay the Mony of both Mortgages or not to redeem it at all: As in Sir John Fagg's Case, who having purchased on a defective Title for a small Sum, obtained into his hands the Deed of Intail against him.

Chancellor. The Son is a Stranger to the Father, and all one as a Stranger, and differs from Fagg's Case, and decreed a Redemption on payment of the 100 l. Damages and Costs. The Mortgagee did oppose the Redemption by his Answer; but as to the practice in gaining the second Mortgage it is not material, for he did nothing but to secure a just Debt.

Costs.

Axtel

Axtel *contra* Axtel. 4 March, 1679.

The Caſe.

Election. Deviſe. Eviction.

THE Huſband deviſed three Tenements, and one called Cox's Tenement, to his Wife in ſatisfaction of her Dower, with Election to her to take one or the other, the Dower or the Legacy; afterwards he ſold Cox's Tenement and died without new publiſhing the Will. The Wife inſiſts to have ſatisfaction for Cox's Tenement, becauſe her Huſband gave her that with the reſt as in ſatisfaction of her Dower to which ſhe is intituled. And the Plaintiff cannot bar her of her Dower by the Will; but the Lands deviſed are but Church-Leaſes. And (ſaid her Counſel) ſhe aſketh nothing of the Court, but that ſhe may have only what the Law giveth her.

Chancellor. She muſt take the Will as it was at the time of the death of her Huſband, for till then 'tis no Will; let her chuſe one or the other, ſhe may not have both; and decreed accordingly.

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DE
Termino Paſchæ
Anno Regis 32 Car. II.
In
CANCELLARIA.

——*contra* Wilkinſon. 1 May, 1680.

Account of Legacies. Legacies in Proportion.

J. S. ſeized of Lands and Houſes in Fee, by his Will in writing deviſeth to A. Lands of 100 l. per Annum in Fee, to be ſet out by his Executor, and 5000 l. to one Kinſman, and 3000 l. to another, and dieth: The Executor ſets out to A. Lands for 100 l. per Annum, which were worth more, and thereby the Lands and Houſes left are not ſufficient to pay the 5000 l. and ſo forth. The Legatees exhibit their Bill to avoid the ſetting out of the Lands.

The Defence made againſt it was; 1ſt. That the Deviſe of the Lands was a Specifick Legacy, and conſequently not to come in average with the other Legacies.

But the Lord Chancellor decreed, That it was not a Specifick Legacy, but quantitatis, and therefore if there were not ſufficient, each ſhould bear his ſhare in the loſs. But then it was objected, That it was not practicable in this Caſe, becauſe that A. had for valuable Conſideration alienated ſome part of the Lands.

The Lord Chancellor decreed, That Sir J. C. a Maſter of the Court, examine the value of the Lands and Houſes what they were worth to be ſold at the Teſtator's death; and if A. had more than his Proportion of the whole value, to pay for it.

Ebrand *contra* Dancet. 7 May, 1686.

THE Grandfather takes Bonds in the name of his Children being Infants, the Father being dead.

Chancellor. There is difference in the Caſe, where the Father is dead and where he is alive; for when the Father is dead the Grand-children are in the immediate care of the Grandfather, and if he take Bonds in their Names, or make Leaſes to them, it ſhall not be judged Truſts, but Proviſion for the Grand-child, unleſs it be otherwiſe declared at the ſame time; and decreed accordingly on that Reaſon, though there were other matters.

Admiralty. Merchant.

Nota, Eodem die 7 Maii, ex relatione Mr. Finch Solliciter. A Ship broke the Ship of I. who ſued in the Admiralty the Ship for recompence: J. D. became Bail for the Ship in the Court of Admiralty; whereupon the Ship being diſcharged, was ſold to the Defendant: the Surety in Proceeding was condemned in the Admiralty; he ſueth here to be relieved and diſmiſt: Ex relatione Mr. Finch Sollicitor General.

Thomas, &c. *contra* Lane *Widow.*

JEffery Thomas had four Children; John his eldeſt Son, Father of the Plaintiff; Grace, married to Lane deceaſed, Elizabeth and William: And by his Will deviſed his part of a Houſe in Exon to Grace and other Houſes; one to Elizabeth, another to William, with this Clauſe, That if any other of his ſaid Children died, his part ſhould go to the Survivors: He died: John, Grace and her Husband, and William, came to an Agreement with John, which was executed by writing and poſſeſſion accordingly, near twenty Years: John deviſed the Lands to raiſe Portions for two of the Siſters; his Daughters were paid their Portions; the Plaintiff is the third, and ſueth to have the Agreement ſtand; for Lane the Widow ſued at Law, and recovered part of the Lands, which by the death of John accrued to her, Elizabeth and William. The Decree concerned Lane only, becauſe of her Coverture at the time of the Agreement. The Caſe as to her, that by the Agreement,

ment, whereas the Houſe, viz. a part of it was deviſed to her only for life, John was to convey it and a Garden, and Curtilage adjoining to her for her life, Remainder to her Daughter Rebecca for her life by Deed; and a Covenant in the ſame Deed to eſtate the Husband of Rebecca or her firſt Child therein alſo after her and Rebecca; and though the Agreement and Execution thereof could not bind her, yet ſhe after her Husband's death having entred into the Houſe, and alſo the Garden and Curtilage, (which was not deviſed to her, for though a Meſſuage deviſed will carry a Garden and Curtilage, yet the Deviſe of a Houſe will not, eſpecially being deviſed without the words cum pertin' or the like) hath now ſince ſhe became Sole, conſented to, and taken the benefit of the Agreement made during her Coverture.

The Defendant anſwered, That the Addition of the Eſtate to her Daughter, &c. and his Entry into the Houſe and Enjoyment of it, could not bind her nor conclude her conſent to the Agreement, for ſhe had title to it by the Will, for it is the ſame which was given by the Will, and no more; for the Garden is but a ſmall piece of Ground, but a Poll, and no Paſſage to it but through the Houſe, (as the Councel ſaid.)

The Lord Chancellor diſmiſt the Bill, but ordered that no benefit be taken of the Agreement, or Deed made thereon by Grace or Rebecca, (who was one of the Defendants) becauſe Grace is not to be bound being Covert, and cited the Caſe 7 E. 4. the Wife received Money during the Coverture.

Sidney *contra Earl of* Leiceſter.

LEiceſter-Houſe on the Marriage of the now Earl of Leiceſter, then Lord Liſle, with the Daughter of the Earl of Salisbury, was ſettled on Robert late Earl of Leiceſter for his life, Remainder to the now Earl for his life, Remainder to the firſt, ſecond, &c. Sons of the now Earl in tail, &c. The Marriage took effect; the now Lord Liſle, firſt Son, is born: Earl Robert makes ſeveral Contracts with divers Workmen to build on Leiceſter-fields near the Houſe, and in part ſettled before, and Leaſes for 42 Years (whereof now 14 are expired) were made accordingly; but after the Buildings were begun and proceeded in,

the Builders began to leave off, becauſe they had notice of the Settlement. Earl Robert thereon writes to his Son the now Earl, for his conſent that the Buildings might proceed, and that he would conſent; for the Ground before the Building was but 4 l. per Annum, and the Rent at preſent during the Leaſes is raiſed to 53 l. per Annum, and by Improvement after the Leaſes, will be 2000 l. per Annum. The conſent of the now Earl was proved, and he is decreed to confirm the Leaſes, though the conſent was but verbal, and ſaid it was for the benefit of the Family.

Conſent verbal obliging.

But whether the Lord Liſle, who was in Remainder in tail, ſhould be decreed to confirm, the Lord Chancellor would adviſe.

He aſked and did negotiate between his Father and Grandfather to procure his Father's conſent not only during his Monage, but alſo after his full age.

Hele *contra* Hele. 1680.

Agreement for Jointure.

THE Plaintiff, Widow to H. Hele, ſued for her Jointure; the Bill was founded on an Agreement, whereby for 3000 l. paid in Money, viz. 2300 l. and 700 l. by Aſſignment of Bonds, H. Hele covenanted to ſettle 300 l. per Annum in Lands for her Jointure, and 40 l. per Annum Rent was granted to her before Marriage to bar her of Dower; but this was only in proof, not in the Bill.

The Defendant by anſwer ſets forth, The Will of Samuel Hele, elder Brother of Henry, whereby he deviſes his Lands to Henry for life, Remainder to firſt, ſecond, &c. Sons of Henry in tail ſucceſſively, the Remainder to Richard a Couzen, in like manner, with Remainder to others in like manner; but in the Will a Power was given to Henry to limit the Capital Meſſuage and Lands which are called Fleet, to any Wife; but he executed not this power, and whether that Henry dying before any Execution accordingly, the Court ſhould decree it, it being a new Caſe, the Cauſe was put off till another day.

Meeker

Meeker *contra* Tanton. 10 May, 1680.

THE Bill was againſt the Heir of the Mortgageor to have payment, or whole without Redemption; and becauſe the Adminiſtrator of the Mortgageor was not made Party, the Cauſe being opened at hearing, the Plaintiff could not be admitted to proceed, for in all Mortgages the Mony muſt go to the Executor or Adminiſtrator, and not to the Heir. Mortgage Party. Executor.

Elliott *and* Hele *contra* Hele. 11 May 1680.

ELliott, Father of Hele, the other Plaintiff, ſet forth, That Sir Henry Hele ſeiſed in Fee of divers Mannors, &c. in Com. Devon. Cornwall and Somerſet, in conſideration of a Marriage with the Plaintiff Hele, and 3000 l. did agree to ſettle Lands of 300 l. per Annum on the Plaintiff for her Jointure, and the 3000 l. paid and ſecured, and prays performance. Power not executed.

The Defendant ſets forth, That he knew not the Agreement, but ſaid he claimed not under Sir H. Hele, but by the Will of Samuel Hele, elder Brother of Sir Henry; who by his Will deviſed the Lands in ſuch manner as thereby appeareth, not ſhewing how, but that the Plaintiff could have no Jointure, ſaving that ſome Lands did deſcend to him in Fee.

The Cauſe coming to be heard, was thus, viz. Samuel Hele elder Brother of Sir Henry, ſeiſed in Fee of divers Mannors, & inter alia, of Fleet Damarel, Capel Meſſe, &c. deviſed all (except ſome parcels) to Thomas Carew and others in Fee, on truſt to raiſe 10000 l. Portions for his Daughters and pay his Debts; and this by Sale of all or any part, and by Leaſing as they ſhould think fit, and after for Sir Henry his Brother for life, the Remainder to his firſt, ſecond, and third Sons ſucceſſively, and the Heirs Males of their Bodies, and to the Defendant Richard Couſin for life, the Remainder to his Sons and their Heirs Males, &c. Item, I appoint, deviſe, and give to Henry power to limit and appoint Fleet Damarel, &c. to my Wife after the death of Amy, (who revera had a former Jointure therein, and died before the Plaintiff's Marriage, but nothing was ſaid of

of that at the hearing) Sir Henry after the death of Samuel agreed prout, but died within Three quarters of a Year.

The firſt Queſtion was, If the Plaintiff could be relieved out of the power, for elſe there was not ſufficient for 300 l. per annum?

The Lord Chancellor inclined ſtrongly for the Plaintiff, in regard of the Conſideration, and becauſe Henry had power by the Will to have done it, and was expreſs, that if he had de facto done it, and miſt in time or other Circumſtances to have done it well, the defect ſhould have been ſupplied, for Circumſtances in ſuch Caſe are only put into ſuch Powers, to the end that no Fraud or Falſhood ſhould be impoſed, and cited the Counteſs of Oxford's Caſe, ſo decreed by the Lord Elſmere, and another Caſe; and ſaid that the Stat. de Donis was an ambiguous Act; and at the Bar it was obſerved that the Will gave no Eſtate to Henry, nor Eſtate tail to his Sons, but the Eſtate was in the Truſtees, and a Truſt for Henry, which is under the power of this Court, and Truſts in tail are not favoured in this Court. And it was alſo ſaid, that the Non-performance by Henry ought to be excuſed, and not imputed to the Plaintiff's Prejudice; for the death of Henry happ'ning ſo ſoon after the Marriage, that Accident being the Act of God, prevented him, and Accidents are a proper Object of Relief.

Power.

But after ſome debate Churchill for the Defendant moved, that if the Plaintiff have Right, yet ſhe hath no Bill for it on this Caſe, for ſhe hath ſet forth a Seiſin in Fee, and not the Power; and of that Opinion the Lord Chancellor was. And thereupon the Plaintiff's Counſel prayed, that they might amend the Bill, which was granted, paying the Coſts of the Day.

Equity but no Bill.

DE

DE
Term. Sanct. Trin.
Anno Regis 32 Car. II.
In
CANCELLARIA.

Perne *contra* Oldfield.

THE Church of Crowland in the County of Lincoln, being appropriate to the Abby of Crowland, and no Vicar endowed, (for ought appears it seems that the Cure was served by some of the Monks:) The Rectory came to the Crown; and by mean Conveyances to one Mr. Chapman, who gave the Rectory by his Will to the Maintenance of a Minister there for ever, reserving not the Nomination of a Minister there, nor expressing any thing concerning such Nomination, the Devise of the Rectory being void at Common Law, being made to no certain Person. The Estate thereof came to Sir Thomas Orsby and Wingfield, who did appoint and nominate the Defendant Oldfield to be Minister and serve the Cure; afterwards the Plaintiff, supposing a Laps to the Crown, was presented, instituted and inducted, as if the Church had been void. Orsby and Wingfield Rectors, supposing that the Nomination of the Minister belonged to them, nominated Oldfield: Perne sued the Rectors for Tithes off Fen-lands improved lately, and gained from the Water. They pretend a non decimando under the Abby: And that Perne the other Defendant was not Minister; so he pretended that the Tithes belonged to him.

Curate Ecclesiastical.

Tithes of Fen-Land improved.

For

For the Plaintiff it was said, that here is a pious use wholly subject to this Court; and that Perne coming by the Ordinary, though he was not Parson or Vicar, was allowed by the Bishop, and decreed accordingly that he should have the Tithes; but as to the non decimando, a Trial, &c.

Williams *contra* Day. 18 June 1680.

Executrix.

THE Plaintiff Rebecca complains, &c. The Case on the Bill was, That the Defendant, Executrix of her Husband, sued her as Executor of Roger Win, with Robert Son of Roger, and Co-Executrix with her, for a Debt of 400 l. Principal, due by Bond: That Roger a Mercer dying, the Plaintiff was sick and unable to manage the Estate. Whereupon Robert entred into the Shop, paid Book-debts, (for advantage of the Trade, which he continued, whereby the Estate was wasted as to Creditors by Bond;) and there being Leases for years of good value, and great Debts by Bond, the Plaintiff and Robert agreed that those Leases should be sold, and the Mony paid to Robert, and he to pay the Mony to Creditors by Bond. The Plaintiff joined with him in the Sale, and he received the Mony, paid it to Creditors by Bond, and complains that in a Trial against her in debt brought on the Bond, whereto she pleaded plene Administravit, the payments of the Bond made by Robert in discharge of her, was not allowed by Sir William Scroggs, Chief Justice, unless that she would stand in Robert's place, and be chargeable as he was, and by consequence with the Devastavit committed by him, whereto she ought not to be liable. The Trial proceeded not to a Verdict, but a Juror withdrawn, and now she prays relief.

Account binds one not Party to it. Mortgage.

Land is mortgaged to A. then to B. then to C. If A. sued to redeem, and try his Debt by Decree, C. A. and B. shall be bound by the Account which A. made in his Suit, and pay or contribute to the Charges of Suit; if made without Fraud or Collusion. Vide ante.

Waste.

The Lord Chancellor declared, that he would stop pulling down Houses, or defacing a Seat by Tenant after possibility of Issue extinct, or by Tenant for life, who was dispunishable of Waste by express Grant, or by Trust.

Jason

Jaſon *contra* Eyres, Domin', &c. 14 June 1680.

SIR John Hanmer ſeiſed in Fee of the Mano⁷ of Great Hinton, &c. mo⁷tgages the ſame to Sir Tho. Skipwith fo⁷ 7000 l. and fo⁷feited it; the ſame was afterwa⁷ds conveyed to Ann Fiſher and her heirs on Agreement, that if Sir John Hanmer o⁷ his heirs paid 4000 l. with Intereſt, the Lands ſhould be reconveyed, otherwiſe to be abſolute.

Mortgage notwithſtanding particular Agreement *e contra*.

The Mony was not paid, then Sir John Hanmer and Ann Fiſher agree with Sir Robert Jaſon, Father of the Defendant Jaſon fo⁷ the ſale of the Premiſſes fo⁷ 11500 l. 7000 l. was paid, and the Lands conveyed to Sir Robert Jaſon the Father and his heirs, the 4000 l. and Intereſt was ſtill chargeable on the Land: Afterward there was a Treaty of Marriage to be had between Sir Robert Jaſon and the Complainant Dame Ann, and by Articles 1674. it was agreed, That 2100 l. ſhould be paid to M⁷. Fiſher towards that Debt, 1500 l. whereof being the Portion of Dame Ann, was paid and 600 l. mo⁷e by Sir Robert Jaſon, by which the Debt was reduced to 1900 l. Principal-money, fo⁷ ſecuring whereof a Leaſe fo⁷ 500 Years was made of the Premiſſes to Travers and Finch Defendants, &c. And is provided fo⁷ payment of the ſaid 1900 l. with Intereſt, viz. 57 l. on the 25th of December 1674. and the 25th of June 1675. other 57 l. and 1957 l. on the 25th of December 1675. And that afterwards the ſaid Fiſher ſhould join with Sir Robert to convey the Premiſſes to Carew and Holbech, and their heirs, to the uſe of Sir Robert fo⁷ life, the Remainder to Dame Ann fo⁷ her Jointure, and in full of Dower. The Remainder to the Defendants, Carew and Holbech, and their heirs in truſt, that if Sir Robert the Father ſhould pay the ſaid 1900 l. with Intereſt as afo⁷eſaid, amounting to 2700 l. if he ſhould ſo long live: O⁷ otherwiſe, If he ſhould within three Years after the date of the laſt Conveyance, bearing date the 19th of June, 26 Car. II. if he ſhould ſo long live, pay the ſaid Debt on the ſaid Leaſe, and procure the ſame to be ſurrendred; To the intent that if the Complainant Dame Ann ſurvived him, ſhe ſo long as ſhe lived might hold the Premiſſes diſcharged of the ſame; then the ſaid Carew and Holbech ſhould be ſeiſed of the Premiſſes to the uſe of Sir Robert and his heirs.

But in case failure of Payment was made, or that Sir Robert, her intended Husband, should die before Payment and Surrender of the said Lease; in either of the said Cases the said John Carew and Holbech, and the Heirs of the said Survivor, should stand seised of the Reversion to them limited, in trust for the said Complainant and her Heirs, not only to enable her to pay the said Debt, and free her Jointure thereof; but to the end she might enjoy the Inheritance for increase of her Fortune, according to Agreement between her and the said Sir Robert; and that then they should convey the same as she, (during Coverture or Sole) or her Heirs should direct.

28 March 74. Sir Robert Jason died; Jason the Defendant being his Heir, Ann his Relict after married Sir Christopher Eyres the Plaintiff; and there being a former Incumbrance not taken notice of to Mr. Hodges of 1000 l. Sir Christopher Eyres paid that 1000 l. with Damages.

On this Case cross Bills are exhibited by Sir Christopher and his Wife, to have the Inheritance; and by Jason to have the Inheritance, he paying the Debt.

1st. At the hearing on Eyres his part, it was pressed as the express Agreement, that the Wife should have the Inheritance, the Debt being not paid, nor Lease surrendred.

2dly. That it could not be a Mortgage as to Ann the Wife, though the Lease was a Mortgage to Fisher.

3dly. If it had been meant to have been a Mortgage, the power of Redemption would have been limited to the Heir as well as to Sir Robert the Father, which was only limited to the Father, and not to his Heir.

4thly. There was reason for so doing, because the whole Portion was expended in reducing the Debt, and so till payment of the Debt she would be without any Profits of her Jointure.

5thly. The Cause being foreseen, it was expressly agreed, that the Reversion in the Trustees settled should go to the Complainant and her Heirs, not only to enable her to pay the Debt and free her Jointure, but to the end she might enjoy the Inheritance for the increase of her Jointure.

1. But the Lord Chancellor decreed it a Mortgage, saying, That if the Father Sir Robert Jason had lived after three Years, it could not be denied but he might have redeemed it.

2. That

2. That no Mortgage by any artificial words can be altered unless by subsequent Agreement.

3. That divers Pleas touching Parol Declarations were offered and read on both sides, of which the Court would take no notice, but rejected.

Anonymus. 8 July 1680.

The Case.

A Took a Statute for payment of 200 l. lent, but finding a former Incumbrance for other 200 l. to B. did purchase B's Estate; then discovering another Mortgage made by Dicklemere to C. for 500 l. purchased in that also: But Dicklemere who made all these Incumbrances, did make another to the Plaintiff subsequent in time to the first Mortgage for l. but preceeded to the two last, and this Mortgage. The Bill is, that he may pay off the 500 l. Mortgage to be let in, &c. Pay all or none.

The Question was, whether he should be admitted without payment of all, viz. the two latter? and decreed he should not unless the first 200 l. Man had notice, &c.

Eodem die Linch *contra* Cappy.

CAppy, Executor in trust for Linch in Remainder, after the Testator's Children, or other nearer Kindred to the Testator than Linch was, of the Residuum of the Testator's Estate, and after for Linch in case they died as they did. Linch now sues Cappy for an Account: The question was, whether Cappy, who did receive great Sums of Mony of the Testator's Estate, and put out the Mony again at Interest, and received Interest for the same, should answer the Interest so made and received by him? and on much debate it was decreed he should not. Lord *North* in his time declared *e contra hic.* Interest. Executor.

But then it was insisted on, and it was true, that Cappy had annexed to his Answer an Account of all his doings, wherein he brought to account the Interest as well as the Principal, and therefore had adjudged the Case against himself. The Councel *e contra* answered, he could do no other; for the Bill requires his Answer to the whole Transactions.

The Lord Chancellor. Did he offer to pay the Intereſt as well as confeſs the Receipt of it? No; and therefore pronounced for the Defendant as before: But ſome Propoſition of an Expedient was then offered and accepted.

Anonymus. 13 July 1680.

Freight.

A Part-Owner of a Ship ſued the other Owners for his Share of the Freight of the Ship which had finiſhed a Voyage; but the other Owners did ſet her out, and the Plaintiff would not join with the reſt on ſetting her out, or in the Charge thereof; whereupon the other Owners complained thereupon in the Admiralty, and by

Refuſal. Merchant.

Order there the other Owners gave Security that if the Ship periſhed in the Voyage, to make good to the Plaintiff his Share; and if ſhe returned, to reſtore his Share, or to that effect: And in ſuch caſe by the Law-Martine, and Courſe of the Admiralty, the Plaintiff was to have no Share of the Freight. It was referred to Sir Lionel

Admiralty.

Jenkins to certify the Courſe of the Admiralty, who certified accordingly; And that it was ſo in all places, and otherwiſe there could be no Navigation: Whereupon now the 13th of July the Plaintiff was diſmiſt.

Faſhion *contra* Atwood. 19 July 1680.

Agreement. Aſſignment. Executor.

PEarſon living in London, was Agent and Factor for Atwood now deceaſed, to ſell Norwich-Stuffs in London, which Atwood ſent him from Norwich: And in the management of this Trade, Atwood charged Pearſon with Bills of Exchange; and it ſo fell out that Pearſon had ſold in Atwood's name divers Cloaths for Money payable at future days; and doubting he had not Goods in his hands to make good what he had undertaken by accepting Atwood's Bills, informs Atwood of it, and Atwood agrees that Pearſon ſecure himſelf out of what Effects, &c. he had. At this time Atwood was indebted to Eborne, and debtor by Bond; and Pearſon was likewiſe indebted to others on his own account: Pearſon by word aſſigns to his Creditors the Debts which were due to Atwood; Atwood and Pearſon both die: The Adminiſtrator of Pearſon, and the Aſſignees of the Debts due to Atwood, but aſſigned

aſſigned by Pearſon to his Creditors, ſue the Executrix of Atwood for to have the benefit of the Debts due to Atwood for his Goods ſold by Pearſon, but aſſigned by Pearſon to his own Creditors.

The Queſtion was, whether the Aſſignee of the Debts by Parol made by Pearſon, and the Parol Agreement of Atwood, that the Goods and Debts which Pearſon had and contracted for, ſhould be his Security for his undertaking for Atwood, ſhould prevail againſt the Creditors of Atwood, eſpecially ſuch Creditors of Atwood as had Bonds; for the Perſons who had bought Atwood's Goods of Pearſon did know that the Goods were Atwood's, and not Pearſon's, and entred in Pearſon's Books as Debts due to Atwood not to Pearſon; and thereupon we of Counſel with the Executor of Atwood, and the Creditors of Atwood by Bond inſiſted:

1ſt. That the Goods were ſold as Atwood's Goods, and the Buyers entred in Pearſon's Books as a Debt to Atwood, Pearſon had no remedy on the Contract; but Atwood was ſolely Owner of the Debt:

2dly. That the Debt being a thing in Action, is not transferable by Law; ſo as notwithſtanding the Agreement of Atwood, he ſtill in Law remained Creditor; and this is a Caſe between Actors and Factors in England, not of Merchants, who by Law-Merchant may aſſign Debts.

3dly. That though in Equity Pearſon might retain, or be intitled in Equity to the Debt againſt Atwood himſelf; yet now the Caſe is changed by the death of Atwood, for now the Creditors of Atwood by Bond are in a better caſe than Pearſon, who had no title but by Parol; and if Pearſon would ſue the Executrix of Atwood, ſhe could not pay him; but if ſhe did ſhe ſhould commit a Devaſtavit, and break her Oath as Executrix; and the Aſſignees of Pearſon could be in no better caſe than Pearſon, and his Executors were. Devaſtavit.

4thly. The Creditors of Atwood by Bond had a good title in Law to be ſatisfied out of his Eſtate and Debts, and they had done nothing to prejudice their Title: And the Caſe is not the ſame, for the Goods remaining unſold as for Debts.

The

The Lord Chancellor. By the Agreement Pearſon had a good Title in Equity to the Debts, which in Equity are become his, and are no longer Atwood's; and therefore decreed for the Creditors of Pearſon.

Methinks there was another Equity for Pearſon, but was not mentioned or inſiſted on, viz. That in caſe of Merchant and Factor, the Merchant ſhould not have account from the Factor, but if the Factor were out more than could be demanded from his Factor, (as in this Caſe it happened) the Merchant ſhould firſt make even.

Anonymus. 20 July 1686.

Joint Traders.

TWO Drapers entred into Articles of Copartnerſhip, each brought in a 1000 l. Stock, there was no benefit of Survivorſhip, neither to become indebted without the other, neither to take out of the Stock without the other; One became indebted 100 l. without conſent of his Partner, made his Wife Executrix and died; his Wife confeſt Judgment for the Debt, the other ſues for Account and Relief againſt the Creditor and the Wife; they confeſs the Articles, and obtaining the Judgment.

And 20 July 1680. on debate, The Lord Chancellor granted an Injunction againſt the Judgment, becauſe the Debt related not to the Partnerſhip, ſaying if this ſhall be ſuffered no Trade could be in ſuch Caſe. Mr. Solliciter cited Atwood's Caſe, prox' ante 36.

Eodem die.

Solliciter received the Plaintiff's Mony without his Knowledge.

The Plaintiff having a Decree for Mony, the Plaintiff's Solliciter without order from the Plaintiff received the Mony; the Plaintiff knowing nothing of it proſecuted again. On Complaint the Solliciter was ordered to pay back the Mony, with Intereſt, Coſts and Charges.

But as to the Plaintiff, the Lord Chancellor allowed the payment good, and bid the Plaintiff if he would, take his remedy againſt his Solliciter.

Anonymus.

Anonymus. 12 January 1680.

THE Wife Executrix to her Husband, married a second Husband. A Bill is exhibited against them to diſcover the Truſt; the Husband and Wife diſagreed in the matter, and put in ſeverally their Anſwers; the Husband denied the Truſt, but the Wife confeſt it. The Cauſe proceeded to hearing, and the Plaintiff proved the truſt only by one Witneſs, which the Plaintiff inſiſted on with the Wife's Confeſſion, to be ſufficient; the matter being but in that wherein ſhe was concerned as Executrix. But the Bill was diſmiſt, quia the Wife's Anſwer ſhall not bind the Husband, ex relatione Sir J. Churchill and Serjeant Rawlinſon.

The Wife's Anſwer not prejudice the Husband. *Teſtis ſingularis.*

DE

DE
Term. Sanct. Hill.
Anno Regis 32 & 33 Car. II.
In
CANCELLARIA.

Balch *contra* Tucker. 24 January 1680.

Trial directed on a Point not in Iſſue.

AN Agreement was made under Hand and Seal, that Balch was to pay A. S. her Debts being 300 l. and ſhe was to diſpoſe by her Will any Sum of Mony not exceeding 200 l. and A. S. being ſeiſed of an Eſtate for Lives, to her and her Heirs, of the Rectory of Huiſh; it was agreed, That if ſhe had a Child, the Child ſhould have the Rectory after her death, but if the Child died, the Plaintiff Balch was to have the Eſtate. This Agreement was made in order to a Marriage between the Plaintiff and A. S. The Marriage took effect, the Child died, A. S. made her Will, and thereby gave 150 l. in Mony Legacy, and died. The Defendant her Heir, brought an Ejectment for the Rectory, and recovered it by Verdict as he muſt do, there being no Eſtate yet paſſed. Balch exhibits his Bill, ſets forth the Agreement, and prays Execution, paying the Legacy and the Debts. The Defendant by Anſwer, poſitively denies the Agreement: The Cauſe went to Proof and hearing; the Plaintiff proves the Agreement fully; the Defendant examined one Witneſs to prove that the Morning before the Marriage A. S. was troubled, and wept, and declared to him that the reaſon of it was that ſhe would not marry unleſs a Writing which ſhe had made to her Husband might be

be delivered to her again. Whereupon a Writing was delivered to him, and he delivered it to A. S. the Husband saying she should have any thing so she would marry him. The Marriage proceeded, the Cause coming to be heard, the Court ordered a Trial upon this Point only, viz. Whether the Agreement were waved? A Trial was had, and found for the Defendant that the Agreement was waved. The Plaintiff moved for a new Trial, and was denied, and an Order to dismiss the Bill; and now the Plaintiff moved again for a new Trial, or that the Cause may be re-heard. J. offered it to the Court, that the Direction for a Trial at first was hard upon us.

The Question only upon Bill and Answer was Agreement, or not: Nothing in Issue, whether the Agreement was discharged, for that was quite contrary to the Issue; and if the Witness swore never so false, he is not perjured, and it is impossible for the Plaintiff to disprove the Allegation of a Defendant, which the Defendant never alledged; and it seems a piece of Artifice to make that a Defence of which the Court can never give Judgment, (when a thing is not alledged:) The Court must judge Secundum Allegata & probata; but by this way the force of an Evidence proper for the Court, shall be judged by the Jury, and not by the Court; for in this particular Case, if the Deed it self had been delivered up, yet it's no Discharge in Law except it had been cancelled: If it be granted that the very Deed was that which she desired, which yet he did not prove, for he, viz. the Witness swears he cannot write nor read, nor tell what it was that was delivered; yet it can amount to no more than that she desired to have it in her power to destroy it, which she never did; for it's proved the Husband had it after her death: And if the Defendant be too hard for us in the form of Proceeding, coming so late, we have more of the Strength of the Cause on our part in point of Substance.

The Court said we came too late, and would do nothing in the motion.

Note, The Court directed this Trial not upon a Deed shown, but upon Matter of Fact.

Juxon *contra* Morris. 8 February 1680.

Surrogate Deputy within the Stat. E. 6.

AN Officer within the Statute of 5 Edw. 6. (as I take it a Surrogate) makes a Deputation of his Office, rendring thereout 90 l. per Annum, and exhibits a Bill to have an Account.

The Defendant pleads, that the Deputation is void by the Statute, and ought to have no Account, it being in effect a Farm within the Statute.

Vide *Lockner & Strode*, Ante.

Curia. After long debate the Plea was allowed.

Comes Banbury *contra* Briscoe. *Eodem die.*

Deed brought into Court for use of each Party.

GReat Settlement was made of the Estate of the Earldom, consisting of divers Manors. Parcel of the Land on good Consideration was settled, under which Briscoe claims, being a Security for 6000 l. and the Deed of the grand Settlement delivered to Briscoe, or those under whom he claims: the rest of the Manors, &c. came to the Plaintiff, who exhibited his Bill to have the Deed of Settlement, offering in his Bill that Briscoe shall have a Copy attested by the Court.

Briscoe pleads his Settlement, and that he cannot make any Title without the grand Settlement, and therefore keeps it; but offers to the Plaintiff, that he may have a Copy of it attested, and that he will produce the Deed on all Occasions at the Plaintiff's Cost.

Upon hearing the Plea the Lord Chancellor said, If Tenant for life have a Deed, whereby the Reversion and Inheritance is in another, he may at Law detain the Deed against the Reversioner; and ordered, that the Settlement shall be brought into Court for its safest Custody, and both Parties have the use of it as they have occasion: And both Parties if they please shall have Copies attested.

Knight

Knight *contra* Cooke. *Eodem die.*

J. S. ſeiſed of the Reverſion after an Eſtate for life, of divers Copyhold Lands, and two Acres of Freehold Lands, which Freehold Lands were in the poſſeſſion of Ralph and the reſt in A. B. C. Miſtake in a Conveyance. Copyhold.

J. S. aſſigns to J. D. and ſurrenders the Copyhold, and J. D. aſſigns the two Acres of Freehold to the Plaintiff, and inter alia, the Copyhold in the tenure of James

Theſe Aſſignments were on valuable Conſideration; the Bill charges that this was a Miſtake, James being named for Ralph; and that the true Intention of the Parties that made the Aſſignment was, that the Copyhold in Ralph's Tenure was to be aſſigned, and that James had no Copyhold there, and therefore muſt needs be intended that Ralph had; becauſe James had none, James and Ralph having both the ſame Sirnames.

It was alledged, that the Aſſignment and Poſſeſſion had been 20 Years; but after it appeared that it was but 4 Years ſince the Tenant for life died.

The Lord Chancellor inclined at firſt againſt the Plaintiff, but at laſt declared that the Copyhold could not paſs but by Surrender only, and not by Conveyance.

Colſton *contra* Gardner. *Eodem die.*

The Caſe was.

THE Plaintiff exhibited a Bill for an Account of a Perſonal Eſtate, and an Account was decreed, and referred to a Maſter to take the Account: Exceptions were taken to the Account, and referred back on one Exception. In the interim the Defendant having had a Treaty for the Marriage of his Son, but nothing concluded; he did by Deed in conſideration to enable his Son to make a Jointure in caſe he married, and in conſideration that his Son had undertaken to pay his Debts, amounting to 1700 l. ſettle all his Lands upon his Son and his Heirs, the Lands being of far greater value, viz. many 1000 l. and the Creditors were no Parties to the Deed, and in the Deed a power of Revocation reſerved to the Father in Account of a perſonal Eſtate decreed and referred to a Maſter.

caſe the Son ſhould die without Iſſue. This was done before the Maſter made his ſecond Report: And the ſecond Report varied but 11 l. from the former, being about 400 l. due upon both Reports: Proceſs of the Court was purſued to a Sequeſtration againſt the Father and his Aſſigns, the Son being taken up on Attachment for diſobeying the Sequeſtration; but being examined, excuſed himſelf by the Title aforeſaid.

Sequeſtration.

The Queſtion was, whether the Son was liable to the Sequeſtration in this Caſe? Which was much debated by Councel on the Son's behalf.

1ſt. Becauſe there was no Land demanded by the Bill only on Account of a Perſonal Eſtate.

2dly. Becauſe at the time of the Alienation the Account was not aſcertained or adjudged, and the Caſe of an Outlawry was juſt; the Party aliening after the Outlawry, his Land was not ſubject to it in the hands of the Alienee. And

3dly. The Sequeſtration was for the Contempt, not for the Duty.

The Lord Chancellor took time to adviſe on the Caſe, and now, 8 February 1680. delivered his Judgment, and ſaid, he would explain himſelf for Learning and Eaſe.

He obſerved that the Judges at the Common Law were ſevere, and unwilling to ſupport or aſſiſt the Proceedings of Chancery: And therefore he would cite ſome Caſes and Proceedings againſt the Proceedings in Chancery firſt, and then apply them to the Caſe in queſtion.

Object. 1. That this Deed or Settlement was made between Father and Son only, and the Friends of the Son's Wife, nor Wife, no Parts to it: And all the Eſtate the Father had in the World was conveyed to, and ſettled upon the Son in conſideration of this Marriage to be, and 1700 l. to pay his Debts.

2. That a Sequeſtration does not bind till laid upon it, or at leaſt not till ordered.

At Common Law a Man may convey away his Eſtate before Outlawry.

And

And then the Lord Chancellor cited these Cases at the Common Law, as follow:

41 Jac. Cro. fol. 651. Brotlige contra Sequestration.

5 Car. 1. Heber's Case. Trover gist.

20 Jac. Elwes. Indictment for Murder for a laying on a Sequestration, one being killed: Question if justifiable or not, Pardon sued out.

These Resolutions were so bloody and desperate, that it was to maintain them where Conscience and common honesty were concerned to preserve People and their Estates from Tricks and Cheats, and no remedy for any Person in these Cases following, if those Resolutions were maintainable, but since have been changed.

3 Car. 1. Rolls' Abridgment, 376. Bond lost not recoverable.

22 Edw. 4. fol. 6. A Release obtained from Trustee, no Relief, for Cestui que trust.

13 Jac. Finn and Powell.

11 Edw. 4. Resolved that Mony on a Bond, and the Bond lost, and after sued for, yet no remedy, but the Mony must be paid again.

13 Jac. Powell contra Harris; Null Account contra Executor.

Eodem anno. Glascock Entry lawful for Condition broken, not to be relieved.

14 Jac. Bromadge contra Election to pay Damages for Executing a Bargain in Specie.

Trin. 17 Car. Either cited in the C. B. or in the Star-Chamber, moved by Serjeant Bacon for a Prohibition sur Sequestration: The Judges found on debate, that the Land was not within the Sequestration, for which the Prohibition was prayed; but if the Lands for which the Prohibition was prayed, had been subject and within that Sequestration, it was granted the Sequestration had been lawful.

Court-Baron, A Levari fac' may be renewed from time to time; and in Chancery, may be in like manner as at Common Law.

And

And may Sequester Land and Copyhold too, and may be extended to a Personality, for a Sequestration to be laid on and administred by Court of Equity, never to be laid on but conscionably.

Sequestration to come bona fide, without consideration, yet good.

Derby Com. contra Com. Ancram. Sequestration goes not till Suit revived against the Heir, unless the Father's Conveyance be pleaded.

Witham and Bland. A voluntary Conveyance to the Heir to avoid an approaching Sequestration against the Heir, good if bona fide done: But in this Case where Fraud appears, Authority and Reason against it.

Reason 1. Not to allow it in case of a just Duty decreed.

2. Makes this Court Illusory.

3. Permits Mankind to be Cozened.

And two are settled already; Witham and Bland's, which began in the time of my Lord Shaftsbury, and was where the Son claims against the Father, &c. which came to be heard the 4th of March 1672. And was in November following before his Lordship, the now Lord Chancellor, a Sequestration was ordered to issue.

The Son departed from his voluntary Conveyance, and set up a prior Conveyance, with power of Revocation; but the Deed being without a power of Limitation to limit new Uses, which his Lordship then and now declared, that although no power of new Limitation was expressed in the Deed, yet the Law gives the Revoker a power, for he that has power to revoke has power to limit.

17 May 29. Car. 2. Langley and Broydon. A Sequestration for Personal Duty, and then declared a voluntary Conveyance on purpose to bar Sequestration, void.

And here in this Case the Wife shall have that part of the Estate settled on her for Jointure.

Objected by Sir Fran. Winnington; Your Lordship declared a voluntary Conveyance would not bar a Sequestration, therefore permit us to try it.

Curia. No; I am of Opinion there is Fraud apparent, and needs no Trial for Satisfaction.

Snelling

Snelling *contra* Squib. *Eodem die.*

SNelling had Judgment against Sidenham of 1200 l. for payment of 500 l. Squib purchased of Sidenham for valuable Consideration without notice: Snelling sues Squib to discover Lands subject, &c. that he might extend, not knowing the Place nor who Tenants. Squib pleaded his Purchase for valuable Consideration without notice.

The Lord Chancellor allowed the Plea, for such Purchase shall not be hurt in Chancery against the Plea; and therefore Squib shall not be enforced to discover what Lands are liable.

Purchaser of Lands subject to Judgment not enforced to discover, otherwise if to Decree.

1. It was much debated, and objected, That a Judgment binds the Land who ever had it: And the Plaintiff's Bill is not to have a Decree for his Debt, or to have the Land, but to discover the same whereby at Law he may recover his Debt.

2. His Title is given him by Act of Parliament, by which the Land is subject, and was not at Common Law.

3. The Consequence of this Will makes all Statutes and Judgments, which are a Security by Law, to become of no effect, for the Conuzee must extend the whole, or a moiety of the whole: And if he omit any part, his Extent is avoidable, and by consequence, he that acknowledges a Statute or Judgment, and after aliens any part for valuable Consideration secretly, it will be in his power to avoid his own Securities.

4. There will be no difference between a Judgment obtained by Consent, and a Judgment in Invitum, or Process of Law; in which case it will be very hard for any Person, that any Man by his own Act, should avoid the Justice of the Law, whether he carry it secretly or openly, or to enable any other man to do it by secret or other means.

5. Where Men contract, the Purchaser may provide for himself by Covenant; but he that recovers by Law, cannot provide for himself by Covenant; so that the Case is more strong in case of a Judgment, than in case of a Mortgage, or other Estate by Conveyance.

6. A Purchaſer from J. S. who has a Decree againſt him in Chancery for Land, ſhall be bound by the Decree though he had never notice of it; and yet the Decree in Chancery binds the Perſon and not the Land, and the Judgment may bind the Perſon or the Land: And it is hard that the Chancery, whoſe power is only over the Perſon, ſhall execute their own Decrees againſt a Purchaſer, and not aſſiſt the Execution of a Judgment at Law: whereas a Purchaſer after a Judgment is as innocent as a Purchaſer after a Decree, in point of Conſcience.

But the laſt Objection at the hearing was not made.

Lockner *contra* Strode. 9 February 1680.

Vide *Jaxon* and *Morris*, fol. 42. Under-Sheriff's Bond.

BOnd entred into by the Plaintiff of 4000 l. to the Defendant, when High Sheriff of the County of Somerſet: The Bond was without Condition, but intentionally for performance of Covenants, to ſave the High Sheriff harmleſs from Eſcapes, and to pay the High Sheriff out of the Profits of the Office 400 l.

Jones Attorney-General, Inſiſted for the Plaintiff, that the Bond and Contract for ſelling and farming the Office, was void by the Statute.

Serjeant Maynard inſiſted for the Defendant, That it was the Plaintiff's own Agreement to pay it out of the Profits, and the Under-Sheriff was but his Subſtitute; for if the Profits did not extend to 400 l. then he was not to pay ſo much but to be accountable: And if they amounted to more, the Defendant had no power to call him to account for any more than the 400 l. only.

Beſides, the Statute was not Penal, nor inflicted any Forfeiture or other Puniſhment on the Sheriff, if he had farmed the Office.

Curia. My Lord was of Opinion ſeemingly, That the 400 l. ought to be paid, but referred it to a Trial at Law in Dorſetſhire what was the Agreement, whether he was to have 400 l. or no.

Tiffin

Tiffin *contra* Tiffin. 11 Feb. 1680. Vid. Post 55.

Land in question was Mortgaged for Years, and purchased by A. B. from the Mortgagee, the Conveyance was of the Fee-Simple to A. B. and the Mortgage Lease to Friends in Trust for A. B.

Lessee for Years owner of the Inheritance in Trust for him and his Heirs deviseth the Lands, but the Will not signed by him, the Heir hath a Decree for the Term.

Then A. B. makes his Will after the Month of June 1677. The Will was attested by Three Witnesses according to the Statute, but he died before it was signed by himself; the Devise was to his Wife and made her Executrix, and left her Assets enough to pay his Debts, as was alledged by the Plaintiff, but denied by the Wife's Council, but no Proof as to that was read on either side.

The Bill was by the Heir against the Trustees and Wife to have the Term assured with the Inheritance, because by the Original Purchase the Term was to wait on the Inheritance in Equity, which Inheritance did not pass by the Will (e contra) objected, tho' in case of Land the Testator may sign the Will, else void. Yet in case of Personal Estate, a Nuncupative Will is good, and no Subscription is required by the Statute, and this Will is accordingly proved by the Wife in the Ecclesiastical Court, and there may be Debts for ought appears whereto this Lease shall be liable; the Plaintiff's Councel cited the Opinion of Hales Chief Justice who took a Difference between the Cases, the Testator's Original Purchase kept the Lease severed from the Inheritance to preserve it from Incumbrances, and where himself after Purchase of the Fee made a long Lease to wait on the Inheritance.

Lord Chancellor said, I will neither make a Lease for Years that waits upon the Inheritance where it is not Assets in Law, to be Assets to pay Debts in Equity, and where a long Lease should wait upon the Inheritance, the Inheritance being in Trust in other Men, and the long Lease in the Purchaser and the Purchaser dying indebted, so that the Term in Law will come to the Executor and be Assets to Creditors, there I will not make it no Assets in Equity.

Trust of a Term waiting on the Inheritance when shall be Assets.

Mr. Keck offered Reasons with that Difference.

Churchill, e contra, said it was the ancient difference of the Court.

Lord Chancellor affirmed the Difference.

Then Keck objected that here was a plain intention of the Teſtator that his Wife ſhould have it, and the Will tho' not ſigned is a good Declaration of a Truſt of a Term tho' not ſigned by the Party, becauſe ſuch a Will is good as to a Chattel by the Statute.

Lord Chancellor decreed for the Plaintiff againſt the Will, and ſaid elſe the Statute would be of little Effect, for moſt Eſtates have Leaſes, Extents or Judgments waiting on to protect the Inheritance, &c. And if they ſhould be divided from the Inheritance by a Will not ſigned by the Teſtator, the Statute would be of little effect.

In this Caſe I was not a Councel, but remembred the Caſe of Nurſs and Yarworth 1674. reſolved by his Lordſhip, which in Reaſon I thought was contrary to the Reaſon of this Caſe; for there a Will which was void as to the Inheritance, yet was made good as to the Leaſe that waited upon the Inheritance, and the Caſe there was ſomewhat ſtronger, becauſe the Deviſee of the Lands was Plaintiff there for the Term againſt the Truſtee of the Term and the Heir, but is here Defendant.

Ellis *contra* Gnavas.

Heir of Mortgagee decreed to convey to Adminiſtrator of Mortgageor.

Where the Heir of a Mortgagee was decreed to convey the Land to an Adminiſtrator of a Mortgageor tho' the Mortgage was forfeited and the Heir in Poſſeſſion by deſcent and no want of Aſſets, and the Mortgageor did offer to redeem, the Lord Chancellor ſaying for Reaſon, that the Mortgage-Mony being part of the Perſonal Eſtate, the Land ſhall go to the Adminiſtrator, becauſe the Mony would have gone to her. And Quære, if in ſuch Caſe the Mortgagee ſhould have deviſed the Mortgaged Lands by Will in writing, but not atteſted according to the Statute, and that Will proved in the Eccleſiaſtical Court, whether the Deviſee or Executor ſhall have the Land or Mony when clearly he meant the Executor ſhould not have it.

DE

DE
Termino Paſchæ
Anno Regis 33 Car. II.
In
CANCELLARIA.

Sir John Winne *contra Sir* Thomas Littleton *and his Lady*, William Price, *&c.* 30 April 1681.

THE Caſe on hearing was, William Price ſeized of Land in the County of Flint, Merioneth and Denbigh, conveyed them to Goulsborough, but defezanced for Payment of 1600 l. and Intereſt to Goulsborough. Sir Richard Winne was party to the Defeazance, and Covenanted with Goulsborough to pay the Mony in Caſe Price failed; and in ſuch Caſe G. was to convey, &c. to Sir Richard Winne who on failure of Payment by Price paid the Mony, had the Lands conveyed to him, and entred and enjoyed the Lands divers Years.

Mortgage in Fee Adminiſtrator ſhall have the Mony, tho' the Mortgageor (having other Lands) deviſeth all his Lands to *J. S.*

Sir Richard Winne being thereof ſo ſeized, and ſeized alſo of other Lands in other Counties in Wales, whereof part lay in the County of Merioneth (as part of the Mortgaged Lands did, but of no Lands in Flint and Denbigh, but the Mortgaged Lands,) made his laſt Will in Writing, viz. And thereby deviſed to the Plaintiff all his Lands, Tenements and Hereditaments, in the County of Angleſey, Merioneth and Carnarvan, or in any or either of them, or elſewhere within the Dominion of Wales. And after the bequeſt of ſeveral great Sums and Legacies, did go and bequeath all the reſt and reſidue of his Goods, Chattels and Perſonal Eſtate whatſoever, his Debts, Legacies

I deviſe my perſonal Eſtate.

cies and Funeral Expences, being firſt paid unto his Loving, &c. whom he made ſole Executor of his laſt Will, (leaving a Blank.) The ſaid Richard Winne died without naming any Executor of his ſaid Will: And the Defendant Dame Ann being his Siſter of the half Blood by the Mother's ſide, and next of Kin, did take Letters of Adminiſtration of his Perſonal Eſtate with his Will annexed.

Teſtator giveth all his perſonal Eſtate to his Executor, but nameth none it is void.

And herein the ſole Queſtion was to whom the Mortgage-mony being now come to 3000 l. ſhould be paid upon Redemption; the Plaintiff claimed it, becauſe by the Will the Mortgaged Lands did paſs unto him, and conſequently the benefit of the Mortgage-mony, the rather for that Richard Winne had entred on the Mortgaged Lands and was in Poſſeſſion at the time of his Death. And the Deviſe of the Perſonal Eſtate was void, being deviſed to an Executor and none named.

The Adminiſtratrix inſiſted, that now by the Rule and Courſe of the Court, where Lands are Mortgaged for payment of Mony, the Mony is always accounted part of the Perſonal Eſtate, and ſhall go to the Executor or Adminiſtrator when ever redeemed, tho' the Mortgage be in Fee-ſimple as here it was, yea altho' the Mony be made payable to the Mortgagee and his Heirs, and that in this Caſe the Perſonal Eſtate being deviſed to his Executor, is a good Declaration that his Perſonal Eſtate ſhould go to his Executor, tho' the deviſe for want of naming an Executor is void as a Deviſe, and conſequently the Mony belongeth to her as Adminiſtratrix. And it was inforced further, That the Intention of the Teſtator was only to paſs his Paternal Eſtate, becauſe he does not expreſſly mention Flint and Denbigh where the Mortgaged Lands lay, ſaving only Merioneth, where part of the Mortgage lay, but his Paternal Eſtate alſo lay there, and chargeth the Deviſee of his Lands with a Rent-Charge to another Kinſman, which if he ſhould charge the ſame on the Mortgage would be in part loſt upon the Redemption of the Mortgage. And Men when they ſpeak of their Lands, uſe not to call their Mortgaged Lands their Lands; and when the Teſtator deviſeth by the Words all my Lands, he intended his Paternal Eſtate.

Where Lands are Mortgaged for payment of Mony, the Mony is part of the perſonal Eſtate, and ſhall go to the Executors or Adminiſtrators, and not to the Heir.

The Court thereupon and after long Debate decreed the Mortgage-mony to the Adminiſtratrix.

D E

DE
Term. Sanct. Trin.
Anno Regis 33 Car. II.
In
CANCELLARIA.

Anonymus. 1681.

THE Father and Son within Age, Covenant to Convey Lands on valuable Conſideration, the Son was infra ætatem, but being now come of Age, the Father is decreed to procure his Son to convey.

Covenant at under Age decreed to perform.

Anonymus. 1681.

QUeen Elizabeth founded the Hoſpital of in and appointed Five Poor therein, each poor Perſon to have therein 8 d. per Week, and 8 l. per Annum to the Guardian, and made a Prebend Reſidentiary of the Cathedral of pro tempore exiſten' Gardian; the Land ſo given to the Hoſpital is now improved to be worth 60 l. per Annum. Now the Suit being in Chancery for the poor Brethren to have increaſe of Maintenance; it grew to be a Queſtion, whether the Guardian ſhould not have Increaſe alſo: And the Decree was that all above 8 l. per Annum ſhould be to the Poor only. Some of the Counſel made a Difference between this Caſe and where the only Imployment was to be a Guardian, for here he is made Guardian who is a Prebend.

Revenue of Hoſpital improved is for the Poor, not the Guardian who had a certain Stipend.

Anonymus.

Anonymus. 1681.

V. Gill. C. 316.

Deviſe of Lands to pay Debts.

SIR John Gell and others who are Creditors of Charles Agard deceaſed Plaintiffs, againſt John Adderly and others Truſtees of Charles Agard, and againſt Smith Adminiſtrator of Charles Agard, and alſo Creditors of Charles Agard and other Creditors of Agard, and againſt other Purchaſers of his Lands. The Caſe on hearing was, viz. Charles Agard ſeiſed in Fee of Lands, and indebted to divers Perſons conveyed his Lands to the uſe of himſelf for his Life, and after to the uſe of his Will, and by his Will deviſed the Lands to Adderly, Orme, &c. for payment of his Debts and died. The Truſtees being Creditors of Agard, and bound with him as his Sureties, after this Suit ſold the Lands, paid themſelves and other Creditors to whom they ſtood Bound, and the Plaintiffs being alſo Creditors unſatisfied, and nothing left to pay them, their Bill was to have proportionable Satisfaction. At hearing the Lord Chancellor decreed accordingly, and declared,

Truſtees being Creditors pay themſelves firſt.

All Creditors equally concerned where truſt of Conveyance is to pay Debts.

Truſt.

Debt.

No Difference to be made in payment betwixt Debts by Promiſe and Debts by Specialty, but equal in Proportion.

That when a Man ſettles his Lands for payment of his Debts generally, then all his Creditors are equally concerned and intituled, and none is to be preferred before another, and in this Caſe Debts without ſpecialty are to be in the ſame Condition, and equally regarded as Debts by ſpecialty; for tho' there be a difference in Caſe of Executors who are to pay Specialties before Promiſes, that is an artificial preference by Law, but naturally a Debt by Contract without Specialty is as juſt as the other. And the Conveyance to the Truſtees being themſelves Creditors, and Sureties for a Guard, doth not give them any preference before others, but they muſt be in the ſame Degree in point of Payment and Satisfaction as other Creditors were. And tho' ſome Circumſtances in this Caſe might give Hope or Confidence to the Truſtees that they might prefer themſelves, viz. that Adderly was his Servant, Orme lent his Many at the time when the Conveyance was made, and ſome Speeches tending to declare ſuch Truſt, yet that alters not the Caſe; beſides ſuch Declaration was ſince the Statute of Frauds and Perjuries.

On Bill of Review, 35 *Car.* 2. this Decree was reverſt by the Lord Keeper *North* in one Point, *viz.* that thoſe Creditors who had receiv'd their Monies ſhould not refund any part of that which they had receiv'd.

But

But as to the Perſonal Eſtate, the Adminiſtrator may according to Law ſo far as that goeth, prefer himſelf ſo far as the Perſonal Eſtate extends, but no further.

Tiffin *contra* Tiffin. Vide *ante* 49.

Statute of Frauds and Perjuries. Will.

SIR Roger Martin ſeiſed in Fee of Lands in Long-Melford, &c. Mortgaged the ſame for Years; Robert Tiffin agreed with Sir Roger Martin for the purchaſe of the Lands and paid the Mortgagee, and bought the Inheritance of Sir Roger Martin who conveyed the Inheritance, viz. the Reverſion of the Mortgage to Robert Tiffin, the Mortgaged Leaſe for Years was conveyed to Tucke and Groom in Truſt for R. Tiffin; R. Tiffin ſeiſed in Fee of the Reverſion, and Intereſted in the Leaſe for Years, ut ſupra, in Truſt to wait on the Inheritance, makes his Will in Writing, and thereby deviſeth the Lands in Queſtion to J. S. for Life, and afterwards in the ſame Will deviſeth the Lands in Queſtion, and all his Lands, Tenements and Hereditaments, (naming none by Name) to his Wife, charged with ſeveral Sums of Mony, and makes her Executrix; ſhe after his Death proves the Will, and takes Adminiſtration cum Teſtamento annexo, no Executrix being named in the Will. The Will was made after 1674. to wit in Auguſt 1679. the Plaintiff as Heir to the Deviſor exhibits the Bill againſt the Adminiſtratrix and Deviſee, and againſt the Truſtees of the Leaſe. The Cauſe came to be reheard on Petition of the Wife, (for the Cauſe was decreed againſt her formerly, becauſe the Leaſe was to wait on the Inheritance.) And the Will (as to the Inheritance being made after 1674.) and not Signed or Atteſted pro ut the Statute, was void. I was not at the firſt hearing of Councel, but now with Mr. Sollicitor and Mr. Keck, offered to the Conſideration of the Lord Chancellor.

Term. Inheritance.

1ſt. That it is true the Will is void and ineffectual, quoad the Inheritance and Free-hold.

2dly. But is good and will take effect as to the Leaſe and the Truſt thereof, altho' that ſuch a Leaſe regularly ſhall wait upon and go along with the Inheritance, but ſuch attendance of the Leaſe is not by Law, but is a Creature of this Court, but this Court will never make it to

go

go with the Inheritance, if Equity be againſt ſuch attendance, and therefore if a Man purchaſe Land as in this Caſe, and take a long Leaſe in his own Name, and the Fee in Friends Names in Truſt for him and his Heirs, and dieth indebted without other ſufficient Aſſets to pay the Debt, the Executor ſhall retain the Leaſe to pay the Debt, and the Leaſe ſhall not wait on the Inheritance contrary to the expreſs intent and meaning of the owner of it, and the meaning of Parties, and therefore if the Ceſtuy que truſt of a Term that in Equity ſhould wait on the Inheritance, ſhould recite in his Will that he was Ceſtuy que truſt of it, the Reverſion in Fee to himſelf, and ſhould thereby deviſe the Term for payment of his Debts or to younger Child. this would be good in Equity. The Deviſe to the Wife in this Caſe is good to her, tho' by general Words, but the general are as ſtrong as if they had particular Names, for he had no other Lands. As a Deviſe of all Lands will carry a Term for Years in Lands, if there be no other Eſtate of Lands in the Deviſor but for Years. Lord Chancellor decreed for the Heir againſt the Wife, becauſe elſe the Statute would be eaſily avoided, and of ſmall Effect and of dangerous Conſequence, for few Men's Eſtates of value but have Leaſes or Incumbrances by Statute or Judgment, &c. waiting or protecting the Inheritance, and if they may be diſpoſed by Will made without thoſe Circumſtances which the Statute requireth in Caſe of Deviſe of Inheritance, notwithſtanding the Statute, the Statute is of little Effect.

A Queſtion was moved that this Will was not according to the Statute: But the Lord Chancellor himſelf who moved it anſwered himſelf, viz. As to that, That it was proper to be objected in the Court Eccleſiaſtical, and being under probate it ſhall be intended good here.

Daſhwood *contra* Elwell. 20 June 1681.

Factor takes Security in his own Name, without Notice of it to his Principal. Merchant. Factor.

D. Employed E. a Citizen of Exeter to ſell for him divers Iriſh Commodities, which E. received for D. who dwelt in London; E. ſold the Goods in Truſt, and took Bond for the Mony, viz. ſo much as came to 300 l. and died; the Defendant his Son is ſued for an Account, the Queſtion was whether the Bonds be a good Diſcharge, for the Obligeors were failed ſince the Bonds taken

taken, for it was ſaid the Bonds were taken the better to ſecure the Debts, for the Buyers were Tradeſmen as dealt in Wool, and they would be bound to Elwall their Neighbour whom they knew, but not to Daſhwood whom they knew not.

E contra, It was objected, that tho' a Factor having a general Commiſſion or Authority to Sell or Diſpoſe of Goods, may Sell or Diſpoſe on Truſt without ſpecial Warrant, Order or Reſtraint, and may give day of Payment, Yet he cannot take Security by Bond in his own Name, eſpecially without Authority to do ſo, or at leaſt giving timely Notice to his Principal of it, elſe 'twill be in the power of a Factor that deals for ſeveral Merchants, and for himſelf alſo, taking Securities by Bond in his own Name, if any of the Debtors fail to gratifie whom he pleaſeth with the good Securities, yea himſelf, and play the Securities good or bad into his own hand, or into what hand he pleaſeth, which will put a ſtrange Power in Factors, and be extreamly prejudicial to Trade and Merchants: So in the Caſe of Gibbon and Doyley, where the Teſtator gave Reſiduum Bonorum to be divided among Sixteen of his Kindred by Name, as his Executor ſhould voluntarily without Compulſion of Law declare; The Executor divides to Fifteen, and they were ſatisfied, and was willing to pay the reſt to the Sixteenth who now ſued for an Account of what the reſidue was; the Executor pleaded the matter in Bar of the Account, offering to pay the Sixteenth Man the Plaintiff, ſuch a Sum which was as he pleaded the Sum left. But the now Lord Chancellor diſallowed the Plea, becauſe heed was to be taken that we make not ſuch Examples, under which diſhoneſt Men may ſhelter themſelves. And if this Power ſhould be allowed to Factors, diſhoneſt Factors will have a very ſafe ſhelter, and it will be impoſſible to diſcover what Goods he ſells for one, what for himſelf, and what for others. If an Executor hath Orphans or other Men's Mony in his hands, and hath Power to lend it, if he do ſo and take Security in his own Name, which faileth, he ſhall anſwer the Debt of his own Mony, unleſs that he endorſe the Bond, or do ſome other thing at the time of lending the Mony or taking the Security, which may doubtleſs declare the Truth, &c. And in the preſent Caſe, the Factor by taking the Bond in his own Name hath diſabled his Merchant ever to recover againſt

Factor that hath a general Commiſſion may ſell on truſt.

But cannot take Bond in his own Name.

Prejudice Merchants. Gibbon and Doyley.

the Debtor, who knowing no other but that the Goods sold were Ellwall's, and giving him Bond for it, there now is no Remedy for the Debt at Law but in Ellwall's Name on the Bond, which was otherwise before the Bond was taken.

The Lord Chancellor put the Defendant to prove that the Testator Ellwall gave particular Notice to the Plaintiff that he had sold on Trust, and to whom, whereupon a Letter of the Testator to Dashwood was read, wherein he gave Notice of the Sales to Bartlet and his Failing. The Bill was referred to a Master.

Nota. There was no Notice of the Bond in the Name of Elwall not till after Bartlet was failed.

Newcomb *and* Dorothy *Uxor contra* Bonham *and* Alice *uxor'*.

Mortgage.

ANthony Young being seized in Fee of Lands, and a House and Mill of 100 l. per Annum value, (the Plaintiffs proof was 114 l. the Defendants proof 95 l. the Medium 103 l. or thereabout) and being indebted 1000 l. and his Mother seised of 60 l. thereof, to receive out of the Premisses in Possession for her Life, the Reversion to him, agrees with the Defendant who had Married Alice his Sister, that if he would furnish him with 1000 l. whereby he might be enabled to pay his Debts, and have no Interest for it during the Life of Anthony, unless he, viz. Anthony Young during his Life should think fit to repay it with Interest, then he would so settle the Premisses as that he might enjoy the Premisses during his Life, and that the Premisses should be settled to come to the Defendant and Alice his Wife for their Lives, and to the Heirs of the Defendant after his Death, and that he should have Power during Life to redeem on payment of the 1000 l. with Interest, but his Heir should have no Power after his Death to redeem, but the Defendant should absolutely enjoy the Premisses, and gave this Reason, viz. that he might marry and have Children, and therefore would have Power during his Life to redeem, but his Heirs should not, and gave such Instructions to draw assurances accordingly, which was accordingly deposed by the Party who drew the assurance. The assurance drawn was a Conveyance to Bonham and his Wife, and the Heirs of Bonham; and Bonham and his Wife redemised the Premisses to Anthony Young for 99 Years, if he lived so long, and a Covenant,

nant, that if Young during his Life should pay to Bonham 1000 l. with Interest from the Deed on six Months Notice, then Bonham and his Wife to reconvey, and in inforcement of the Defendant's Title against a Redemption by the Plaintiff Dorothy the Heir of Young, who was the Daughter of Young's Brother. It was proved that she had offended him, and he had declared she should not inherit him; that Alice being his Sister, he had kindness for her. And this Case was not like other Mortgages which are mutual.

But a Redemption was decreed by the Lord Chancellor, and the Personal Estate to be applied to aid the Heir towards satisfaction of the Mortgage, because it was a Security, and being so, could not be extinguished by any Covenant made at the time of the Mortgage. The Defendant pray'd a rehearing. 'Tis true, that if it were a Mortgage no Covenant should alter it, but this is not a Mortgage, but an especial Contract, made not in Consideration of lending of Mony, but on Consideration of Blood and Accommodation of the Affair and Necessity of Anthony Young, and to settle his Estate in his Blood; for he was resolved before this Conveyance was made on Two things, 1. By reason of the unkindness of his Neece to him, that she should not have his Land as Heir. 2dly. That if he had no Issue of his own, that then the Defendant Alice should be his Heir and have his Land. But then he considers his own Condition, viz. he was indebted 1000 l. which chargeth him until that were paid, with 60 l. Interest per Annum, besides incident and increasing Charges by renewing of Bonds, Broakage, &c. And as to the Condition of his own Estate to answer the Debt and Interest of his Debt, his own Estate was in Possession but 40 l. a Year, which could not answer the Interest, viz. 60 l. nor ever satisfie the Principal, neither could he have 1 d. out of his Estate to maintain him.

Thereupon he further Considers what way to take to debar his Neece who had disobliged him so highly, as to beget in him such a Resolution as that she should not have his Land, and to prefer his Sister who was nearer in Blood than his Neece, to which he had three Motives, viz. The nearness of Blood. 2dly. Kindness of the one and Unkindness of the other. 3dly. His Sister had Children, but his Neece had none. So that probably if his Sister had his Land, then it would remain in his Blood still, of which he saw no hope in the Neece.

3dly. This Resolution to prefer his Sister was not so absolute, but he would first provide for his own Children if he should have any: This is provided for by the Covenant to redeem during his Life, and the limitation to redeem only during his Life, provides for his Intention touching his Sister.

4thly. On all these Considerations, he himself contrived a way that if it might be effected, and will answer all these Ends, viz. Free him from his present Pressure, want of Maintenance, and free him from present Interest of 60 l. per Annum, give him present Maintenance of 40 l. per Annum, with expectation of 60 l. more after his Mothers Death who was Jointured therein, and then he had hope of a Portion with a Wife to redeem the Estate in his Life-time, and so become a free Man.

And accordingly he makes the Conveyance ut supra, which is not any way suitable to, or like an Ordinary Mortgage which Scriveners make.

1st. There is no Use to be paid during his Life, so that he is freed from Clamour of his Creditors and Debts.

2dly. There is no Covenant on his Part ever to repay either Principal or Interest but at his own Pleasure, so no Interest or Principal could be required of him.

3dly. The Land is conveyed to Bonham and Alice his Wife, Sister of Anthony Young, and the Heirs of Alice the Wife, which were a strange and unreasonable way of Mortgage, that the Husband's Money should be lent and the Security be the Wife's; but this was to comply with the intention above, that the Land in Case he had no Issue should remain in his Blood.

And it was not unreasonable in that Case that the Estate must go to Collaterals and Females, to prefer a Sister before a Neece, especially when the Sister had Children, but the Neece none.

Object. Here is a Power to redeem, and it shall never be extinct by any Covenant at the same time.

Resolv. This indeed is an usual way of borrowing, no Clause shall alter it.

But

But this is here a ſpecial Contract, on ſpecial and neceſſary Occaſion, and is not properly a Mortgage; it is Contractus innominat'.

The miſchief of the Objection is, if it ſhould be, &c. then it would be a way to Oppreſſion, and rigorous Exaction and Oppreſſion of neceſſitous Men by Aſſurers, but here it is quite contrary.

The ſpecial Circumſtances of this Caſe diſtinguiſh it from other Mortgages, and never like to be drawn in Example, for who will lend Mony on ſuch Terms, viz.

1ſt. Never to be able to demand Principal or Intereſt, but to be wholly in the liberty of the Borrower, eſpecially conſidering that the Principal and Intereſt Mony would exceed the value of the Land; as here, if Alice had lived it might.

But yet this is a more ſpecial Caſe, viz. Conſideration of Blood, and a Conſideration not expreſt may be averred, tho' not expreſt in the Deed, and ſo we do, and ſo it appears.

And the worſt of the Caſe amounts to no more than this, viz. if he by Marriage or otherwiſe ſhould not be enabled to redeem, his Siſter ſhould have his Land rather than his Neece.

In caſe of a Mortgage the Mortgagee may exhibit a Bill to diſcharge the Equity of Redemption, and is an incident to the Mortgage which cannot be in this Caſe, &c. Ergo, &c.

The great Reaſon & e contra, is the Miſchief that would enſue to Men in want, who are enforced to borrow Monies, for their neceſſity will induce or inforce them to ſubmit to any Conditions. And therefore in general, and prima facie, the Rule is good, that when a Mortgage is made, no Covenant or Agreement in the Deed of Mortgage ſhall make it unredeemable on failure of Payment, and therefore if a Mortgage be to redeem for Years, or during the Life of the Mortgagor or Mortgagee, and not after, the Mortgage in Equity may be redeemed after, for it is a trivial Clauſe, (not after) and is contrary to Equity in the Creation of it, and would be of evil Conſequence, for every Lender would make himſelf Chancellor in his own Caſe, and prevent the Judgment of this Court in a Caſe proper for the Court, and this were a general Miſchief.

There-

Therefore first consider if there be any probability of such mischief in this Case, such as should destroy the express Contract and Agreement of all the parties made without Surprize or Consideration.

To which end observe how much this Case differs from ordinary Mortgages, and how unlikely to be imitated by Mony-lenders, and to be drawn into Practice or Example.

1st. In other and usual Mortgages Interest is payable till time of Redemption, here none by Agreement.

2dly. The Non-payment of Interest is not for any certain time, as for so many Years, but none to be paid during Life, and that during the Life of the Mortgagor himself. Where is that Mony-lender that will lend on such Terms? For here he can never know as long as the borrower liveth, whether he or his Heirs or his Executors shall be owners of Land or owners of the Mony. In Sir Wollaston's Case, a Redemption of a Mortgage at the Suit of other Creditors was denyed, because of the length of Time, because there ought to be a time when the Mortgagee may be certain of his Interest, either of Land or Mony.

3dly. This is enforc'd from this, That in all Causes of Mortgages regularly, the Mortgagee hath Equity on his side to have a Decree to bar Redemption on failure of Payment, as well as the Mortgagor to have Redemption; the Remedy is equitable and mutual. Regularly and ordinarily, this is so, but it fails on the Mortgagee's side during the Mortgagor's Life. Then 1. This is not an ordinary Mortgage, because not subject to the Rules of Mortgages. 2. And this Circumstance doth make the Case not likely to be mischievous in Consequence, for no Man is like to lend on such Terms.

4thly. The value of the Land conjoined to these former Considerations is very material; the Land in Possession at most but value 40 l. per Annum, besides Taxes, Duties to the Church and Poor, and the reversion of an Estate of a Jointress in Being, and no possession of the 40 l. per Annum during Young's life; so in effect 'tis a Reversion after one life of near 100 l. per Annum, viz. 40 l. per Annum for one life, 60 l. per Annum after two lives, and this conveyed for Security of 1000 l. no Interest to be paid during Young's life.

The

Part 60 l. per Annum, A Mill.

The 60 l. after two lives 7 Years purchase.
600 l. at 7 Years purchase 420 l.
40 l. after one life, 9 Years purchase 360 l.
10 Years 400 l.

So that we have a bad Purchase, &c. if absolute, but if Young had lived 9 or 10 Years a miserable Bargain, and yet he might have lived 20, 30, yea 40 Years.

Surely he must be sick of his Money that will take this for a Precedent, so as there is no fear of the ill Consequence.

Object. Here Young died quickly.

Resolv. He might have lived long, and the Event changeth not the nature of the Agreement.

What Man in his Senses would go by such a Precedent or Example.

If Young had lived 7, 8, 10, 20 Years, the Court would not have relieved him, much less his Heirs.

Two other Reasons, &c.

1. From the Condition of his Estate.

2dly. Of the Consideration, &c. not only of Money, but Blood and Kindred was the Consideration of the Conveyance.

Object. Consideration of Blood is not mentioned.

Resolv. It may be averr'd and is fully proved.

The Lord North *Chief-Justice, and* Champernoon *contra* Williams. 21 June 1681.

THE great and ruling Point in the Case was, whether Cestuy que trust in Tail, suffering a Recovery and no Tenant to the Præcipe, but being in Possession under the Trustee who had the Freehold in him, but was no party to the Recovery, but Cestuy que trust in Tail was the Tenant, should bar the Remainder in Fee of the Trust. The matter was much debated on Reason and Precedents,

Cestuy que trust in Tail suffers a Recovery, its good.

cedents. The Lord Chancellor decreed it a good Bar, and took a Difference, viz. if that there had been a Ceſtuy que Truſt of a Truſt for Life before the Truſt in Tail, ſo that in Caſe the Eſtate in Law had been executed according to the Truſt, and conſequently the Tenant in Tail could not have barred the Remainder in Fee if he had ſuffered a Recovery, there Ceſtuy que Truſt in Tail ſhould not bar the Remainder by a common Recovery if there was no Tenant to the Præcipe. He ſaid alſo that a Truſt is a Creature of Chancery, and is not within the Statute of Will. 2d. de donis, &c. and tho' if Tenant in Tail of a Truſt cannot bar the Remainder by Fine, yet if he makes a Feoffment or Bargain and Sale, he may bar his Iſſue.

Draper's Caſe. July, 1681.

Joint-tenants or Tenants in Common.

SIR Andrew King made his Will, wherein he deviſeth in theſe Words, viz. All the reſt and reſidue of my Eſtate whatſoever, both real and perſonal, I bequeath to my Executors the Survivor and Survivors of them, to the Intent and Purpoſe that they do with all Care and Diligence as ſoon as the Mony can be conveniently raiſed upon Sale of the Premiſſes, and out of the Rents and Profits which will accrue out of my Office in the Cuſtom-houſe, the Leaſe of which and the Proceed and Benefit thereof I intend ſhould be preſerved for the Benefit of my Executors, to pay and diſcharge all my Legacies and Debts.

Sir Andrew King made Edwards and Draper Executors and died, Edwards paid the Legacies and Debts and died; Draper ſurvived, and when all is ſatisfied, then my Will is, that the Term which ſhall remain in the Leaſe of my Office in the Cuſtom-houſe and the benefit thereof, ſhall be and remain to my Executors ſhare and ſhare alike for their Care and Pains in Execution of this my Will.

The Executors were Draper and Edwards.

The Queſtion was, Whether the Teſtator having in the former part of his Will given all his Eſtate Real and Perſonal to his Executors the Survivor and the Survivors of them, but in the latter Clauſe given the Term in his Office to them, ſhare and ſhare alike, the Executors are Joint-Tenants of the Term, or Tenants in

in Common; by the first Clause they are Joint-tenants, but the latter Clause (share and share alike) seems to contradict it, and the surviving Executor claims the Term by Survivorship.

Lord Chancellor, If a Man devise to his Executors, or make several Men his Executors, the Survivor must carry all since the Judges will have it so. (Note this was his very Expression, Vid. Sup. fo.) Yet when the Testator makes a distinction between the Term in the Office and the generality of the Estate, so shall I, and so he decreed the Term to be in common not to survive.

Rep. Methinks the first Clause, a Devise to Executors to pay Debts and Legacies is no Devise or Legacy, prout Dyer.

DE
Term. Sanct. Mich.
Anno Regis 33 Car. II.
In
CANCELLARIA.

The Company of Stationers. * 15 Novemb. 1681.

On Plea and Demurrer.

Stationers Patent Prerogative.

THE Company of Stationers complain by Bill against Lee, for that whereas by Patents the 3d and 4th of Philip and Mary, the sole Printing and Trading in Almanacks was granted to them; the Defendant did print and cause to be printed and vended secretly Almanacks, and imported others from Holland, printed there, and sold them, and prayed Discovery. The Defendant demurred and pleaded: The Demurrer was in effect to the Plaintiff's Title, that it was not good in Law, and that the Bill was only to discover a Tort, as if a Bill should be to discover a Trespass in Lands or Goods.

The Plea was, that he had been Seven Years Apprentice to the Trade of a Stationer in London, and Free, &c. And the Custom of London was, that in such Case any Freeman might use any Trade, &c. The Plea and Demurrer were over-ruled, and the Defendant to answer the Bill.

At which Hearing the Case and Proceedings following were cited.

7 July, 14 Car. 2. Stationers.

Richard Atkins, Esq; and Martha Lady Acheson his Wife, Plaintiffs, and George Moore, Miles Flesher, and others of the Company of Stationers, London, Defendants.

It

It was then alledged, that the Plaintiff, the Lady Acheſon being ſole Daughter and Heir of John Moore, who by Letters Patents from King James, had the Priviledge of ſole printing all Books which concern the Common Laws of England: and the ſaid Moore by his Will made George Moore and others Executors in Truſt for the Uſe and Benefit of the ſaid Dame Martha, to whom he gives all his Leaſes, and ſo the Benefit belongs to the Plaintiffs, and yet the Defendants, &c. do take upon them to Print and Publiſh the ſaid Law-Books without any Authority from the Plaintiffs for Relief wherein, the Plaintiffs have exhibited their Bill, and the Defendants being ſerved with Proceſs have accordingly appeared, but have not as yet put in any Anſwer thereunto, as by Certificate then appeared.

It was Ordered, that an Injunction be awarded againſt the ſaid Defendants, their Servants, Agents and Workmen, thereby injoyning them not to proceed in the Printing of any Law-Books till the Defendants ſhould directly anſwer the Plaintiffs Bill, and this Court take other Order to the contrary. Vid. poſt.

May it pleaſe your Lordſhip, We have ſeveral times met together and Conſidered of the Caſe then annexed according to an Order bearing date the 13th of April 1668. and are of Opinion, 16 Feb. 1668.

That ſuch new Law-Books as have been imprinted ſince Moore's Patent, and acquired by any particular Perſon or Perſons, are not by Law reſtrained by Moore's Patent. But notwithſtanding that Patent, thoſe Men who have acquired them may Print, but as to thoſe Law-Books that were printed before that Patent, there are among us diverſity of Opinions.

Jo. Kelinge, John Vaughan, Matth. Hale, Thomas Twiſden, Thomas Tirrel, Chriſtopher Turner, John Archur, Richard Rainsford, William Morton, W. Wyld.

Upon hearing Council on both parts this day at the Bar, to argue the Errors aſſigned by John Streater Plaintiff, in a Writ of Error depending in this houſe, which Abel Roper, Francis Tytan, John Starkey, Thomas Baſſet, Thomas Collins and John Place commenced againſt John Streater, concerning the Priviledge of Printing Law- 26 May 1675

Books. After due Conſideration had of what was offered on either part concerning the ſame; It is Reſolved and Adjudged by the Lords Spiritual and Temporal in Parliament Aſſembled, That the Letters Patents pleaded in Bar of the Action brought in the King's-Bench, were and are good in Law, and that the ſaid Judgment given in the Court of King's-Bench for the ſaid Abel Roper, &c. againſt the ſaid John Streater is therefore Erroneous, and ſhall be and is hereby reverſed.

Jo. Brown.

Cleric' Parliament'.

Counteſs Downes *contra* Moreton, 16th November 1681.

Conſideration defective when ſupplied. Intention.

SIR Lucy, late Husband of the Plaintiff, Articled with her Father before Marriage in Conſideration thereof, and 6000 l. to ſettle 1000 l. per Annum in Lands, &c. on her for Jointure, but not mentioning the particular Lands, and after Marriage ſettled on her int' alia, his Farm in D. called Haſledon and Woods in called A. the Farm part of it lay as in the Bill named, and part of 60 l. per Annum lay not there, and ſo of the Woods, and if Relief ſhould be here for the part lying out of theſe Wills, which were not well conveyed (as it was agreed on all ſides, the Conveyance was ſo penn'd that they did not paſs) was the Queſtion; but afterward the Husband being made Earl of Downe, made a farther Conveyance to ſome Friends whereby 500 l. per Annum of other Lands were ſettled on the Lady for her Life: The Husband died, the Heir entred into that part of Haſledon Farm, and of the Wood not conveyed. It was proved by many Circumſtances, and the Acknowledgment of the Husband, that he had ſettled the Farm of Haſledon, and thereupon the Lord Chancellor decreed it to the Plaintiff. If the Bill had been only to ſupply the defect of the Jointure, becauſe it was not included in the Jointure, he would not have relieved, becauſe his Subſequent Augmentation might be in Recompence; but the Husband conceiving and declaring that he had ſettled the Farm, the ſecond was not a ſupply of a defect, but a farther voluntary Proviſion, which would not

not have bound his Heir being but voluntary, and therefore as to the defect of value in the Woods he did not relieve the Plaintiff, for that as to them there was no Proof of his Intent, that he had already settled them, and tho' his Covenant was to settle 1000 l. per Annum, and there was want of value (they were 100 Acres) he would not decree as to them, and did not decree them; yet as to the Farm, he did decree for the Plaintiff not to supply the Value, but as that which he intended to settle, and as he thought he had settled, and so had acknowledged divers times not to supply out of the Covenant, but to establish what he intended to settle.

Anonymus. 16 Novemb. 1681.

Privilledge. The King's Servants arrested.

COnizee of a Statute by Sir Philip Howard took him being now a Servant of the King in Execution. He complained by motion in Court of this as a breach of his Privilledge being Servant to the King, who ought not without leave to have been Arrested. The Party shewed that before he proceeded, he acquainted Sir Philip Howard of his Purpose, and that thereupon Sir Philip Howard waved his Privilledge. Lord Chancellor, The Privilledge is the King's Privilledge, and not Sir Philip Howard's; you have been unmannerly towards the King and broke his Privilledge, you might as well have taken the King's Coachman driving the King's Coach. The Party protests all Respect to the King, &c. However said the Lord Chancellor, I will not discharge the Execution, but ordered the Warden of the Fleet to take him into Custody, but because of the Consent to discharge Sir Philip Howard of Execution, the Chancellor propounded that new Security should be given for the Debt, which the Party by his Council consented to, so as it might be a Statute of 2000 l. which seemed to the Chancellor to be too much, because the Debt was but 500 l. Council for Defendant, There are Sixteen Years Interest behind; but at last it was referred as to the Manner and quantum of the Security, and the party discharged of the present Commitment.

Nota. In this Case there was no Bill depending, all came in by way of motion.

N. Pro-

N. Progers *contra* the Lady Fraſer, *the ſame Day on a Plea.*

The Caſe was.

Cuſtody of an Ideot to one and his Executors during the Ideocy.

MRS. Dennis being found an Ideot by Inquiſition, the King granted the Cuſtody, &c. of the Ideot, and of her Eſtate Real and Perſonal to Sir Alexander Fraſer, his Executors and Adminiſtrators; during the Ideocy he died. Progers got a ſecond Grant from the King, and ſueth the Lady for the Lands, &c. ſhe being Executrix of her Husband, and Deviſee of the Cuſtody, which ſhe pleads in Bar. The Queſtion was, whether the Grant to Sir Alexander Fraſer were ended by his Death? Firſt, it is a Truſt in the King, and therefore is not grantable to Executors and Aſſigns. Secondly, The like Grant was never made before. Thirdly, It cannot be ſo granted, for if the Party die Inteſtate, who ſhould take care of the Ideot, therefore the Office of the Marſhalſea cannot be granted for Years: And Fourthly, what Eſtate can the Grantee be ſaid to have?

E contra, it was ſaid, 1ſt. The King hath not only a Truſt as in Caſe of Lunacy, but an Intereſt; for he hath and may diſpoſe of the Profits to his own Uſe, and grant them over, and it being a Chattel naturally ſhall go to the Executors of the Grantee, and it is a ſperial Intereſt, not properly a Term, like Manning and Drake's Caſe, where a Man hath Power to enter and take Profits till 100 l. paid. and Corbet's Caſe, 4 Coke: And in Caſe of Wardſhip there is an Intereſt and Truſt conjoined; for the Law truſts the King and his Grantee to educate and maintain the Ward, and ſo muſt be done in Caſe of Ideocy, as to Maintenance of him or her.

Lord Chancellor ſaid the Caſe of Ideot and Ward are not alike, the Wardſhip is by reaſon of Tenure, the Ideocy by Prerogative; and ſaid, he thought the Caſe of Goalerſhip not grantable for Years too eaſily ſlipt over. But the Caſe was put off, for he remembred a defect in the Inquiſition which found Dennis not an Ideot a Nativitate ſome certain time.

Coven-

Coventry, &c. *Executors of Sir* Henry Thinn *contra* Thinn *now Executor of Sir* James Thinn, 18 November, 1681.

Decree for Mean Profits after a former Decree for Enjoyment.

SIR Thomas Thinn 1639. treated with the Lord Keeper Coventry, for a Marriage between Sir Henry his Son, by Katharine his second Wife, and Daughter of the Lord Coventry, the Portion 4000 l. which was paid. Hempsford, &c. to be settled on Henry, &c. The Deed of Settlement was executed by sealing and delivery of it, it being by way of Covenant to stand seized, but wanted the words (Shall be or shall stand seized) and so was in Law defective. Sir Thomas after the Marriage died, great Suits happened between Sir James, Heir at Law, and Sir Henry, for Sir James entred on Sir Henry, 1648. Sir Henry Thinn exhibited a Bill in Chancery against Sir James on the Agreement, and had a Decree 1650. against Sir James, which was for enjoyment, but no further, not for further Assurance or mean Profits, Sir James continued Disturbances. Sir Henry Thinn 1659. brings a second Bill, but that being ill penned he had leave to amend it, and made Suit for the mean Profits, it abated by death once of Sir Henry Thinn; and Sir James Thinn also dying, now the Bill is for the mean Profit.

Against the Plaintiffs the Objections were: 1st. The length of Time; but that was answered by the many Suits and Abatements of them.

2d. Objection. That it is irregular and improper to have a Bill for the mean Profits now, when Sir Henry Thinn had a former Decree for the Enjoyment 1650 for he then ought to have had a Decree also for the Mean Profits: And it is to be presumed that the Court did then see Cause to make no Decree for the Profits, in regard Sir James had a good Title in Law, and the Times were troublesome, and the Possession a stumbling Possession, sometimes with one of them, sometimes with the other; however, 'tis not reason now to patch up the former Decree by a new one.

The Reply was, 1st. The former Bill demanded not the Mean Profits nor an account thereof.

2dly. It

2dly. It was not unjuſt by one Bill firſt to clear the Title by one Bill, and then to exhibit another for the Profits; and it was not reaſonable till the Title was cleared to the Principal, the Manor ſettled while Sir James ſet up Titles to the whole, one while by an Intail which avoided the Settlement, if not cut off, another while for want of Tenant to the Præcipe in the Recovery which docked not the Intail as to ſeveral Tenements.

But thoſe Queſtions being ſettled by ſeveral Verdicts, now and not before was time to have an account; and 2dly, after a Decree for Enjoyment it is proper to exhibit a Bill for the mean Profits, or as the Caſe may be, for further Aſſurance or for the Evidences.

And for theſe two laſt Reaſons, and particularly for the laſt Reaſon, the Lord Chancellor decreed the Executors to accompt for all Profits by him, his Agents and Baily received ſince the Decree 1650. (Quære, if not the exhibiting the Bill 1648.) but not for all Profits, which he did or might receive without his wilful default, as in ſome Caſes is uſual.

Perrat *contra* Ballard. 22 Novemb. 1681.

Bankrupt. Notice. Purchaſer.

THE Defendant bought of Portman Jewels, Plate, &c. for valuable conſideration paid: Portman became a Bankrupt, and a Commiſſion was taken out againſt him, and the Commiſſioners examined Ballard, the Defendant, touching the Goods what they were, and the value of them, but on pretence that he did not anſwer the Commiſſioners committed him; but on an Habeas Corpus in the King's Bench he was delivered. The Anſwer before the Commiſſioners being as to the time, &c. to his remembrance, and that he could not poſitively anſwer farther, and by conſent he was again to attend and be re-examined, which he did.

And now the Plaintiff's Bill is to have the Defendant's Anſwer in Chancery where he pleaded, that he had no Goods of Portman's but ſuch as he really paid for before the Commiſſion iſſued againſt Portman, and that he had no notice of any act or thing by Portman whereby he was a Bankrupt, but truly paid for what he bought, &c.

It

It was objected he ought to answer the time of the Bankruptism, else the Statute against Bankrupt will be of little effect.

E contra, It is no Equity to make a Man in such Case pay twice.

Lord Chancellor ruled the Plea good, saying, It is an infallible Rule, that a Purchaser for valuable Consideration shall never without Notice discover any thing to hurt himself. But as to the point of Bankruptism, whether that the Defendant being formerly examined by the Commissioners on Oath, should be examined or put to answer to the same matter here, The Chancellor seemed to be of Opinion that he should. But the other Point being clear, there was no debate on this Point.

Pit *contra* Hunt, 20 Novemb. 1681.

THE Wife before Marriage being possest of a long Term for Years, and A. the Person who was to marry her being indebted 400 l. to J. S. by Agreement of A. and J. S. makes a Lease to J. S. for 10 Years to secure payment of the 400 l. the Lands being then accounted 80 l. per Annum, as is alledged, and by Indenture sealed in presence of her Husband, assigns the residue of the Term to Friends in trust to be at her disposal, whether Sole or Covert, (but no other Words then, so to exclude her Husband) and brought in Mony and other Estate to the value of 600 l. She marries; after the Creditors of her Husband (after June 1674.) obtain Judgment in Debt against him. And on Fieri fac. the Sheriff sells the residue of the Term; the Vendees have now a Decree against the Trustees of the Wife for the Term, because the Lords in Parliament had reverst a Decree obtain'd by the Lady Turner who married Sir Edward Turner, who sold Land wherein Trustees for her had a Term for Years, and the Chancellor held it not fit a Decree should be one way in Parliament and in another way here, but declared it against his own Opinion, for else Widows cannot in most Cases provide for themselves. Vide, Awcher's Case, &c. and the Husband in this Case forsook his Wife, refused Reconciliation, allowed her nothing, &c. yet decreed ut supra.

It seems to me that this Case differs from *Turner's*, first because there the Assignment of the Term was on a former Marriage, which Husband being dead, she became owner of the Trust as a Femme Sole, and as to the second Husband all one, as if she had created a Trust for her self of a Term Secondly, the Assignment here is with consent of the Husband, whose Creditors can have no more Right than he had, but *Turner* did not consent, &c.

V. Gil. C. P. 281.

Newland *contra* Horſeman. 23 Novemb. 1681.

Maſter, Merchant, Foreign Servants examined.

HOrſeman being Owner of the Ship called, &c. whereof Ford was Maſter, B. the Plaintiff treated with a Friend of Horſeman's for hire of the Ship, and a Charter-party was ſealed by B. and Horſeman, by which Horſeman agrees that the Ship ſhall ſail to New England to take in Fiſh on the account of Newland, and thence to Barcelona, and there to deliver the Fiſh. Newland Covenants with Horſeman to pay the Fraight on delivery of the Fiſh; the Ship arrives at Barcelona, and the Fiſh is delivered to one Dalmaſie: Ford the Maſter demanded of Dalmaſie the Fraight, and Dalmaſie demands a Deduction out of the Fraight, pretending that there wanted 170 Kintals of Fiſh of what was to be delivered, and that a part of that which was delivered was damaged; thereupon the Maſter ſues Dalmaſie in the Court at Barcelona for Fraight; Dalmaſie ſues likewiſe for deduction of Damage; the Court there ordered the whole Fraight to be brought into Court, and Conſideration to be had for Damages for Dalmaſie; thereupon Dalmaſie appealed to a Superior Court; then Dalmaſie removed the Appeal on pretence of preventing ſeveral Appeals; the Maſter finding his Fraight lodged ſo that he could not have it till the Cauſe was heard in the higheſt Court, which was not like to be in ſome Years time, comes away without any other Fraight or leading there for his Principals Account, which he could not help for want of the Mony for his Fraight; then Horſeman ſues Newland on the Charter-party for his Fraight here; Newland exhibits his Bill in Chancery to ſtop the proceedings here, tho' the Suit was only to recover Damages, and not for the Penalty. The great debate was whether the proceedings at Barcelona being judicial, and begun there by Ford Maſter of the Ship, and Sentence there obtain'd by him ſhould conclude and bar the Defendant, he having cauſed Mony to be brought into Court there, not as excluding the Juriſdiction of this Court by the Sentence there, but that the Court ſhould have regard to the Sentence, and inſiſted that Newland acted here for Dalmaſie, and that Dalmaſie was the principal Factor, and not himſelf, and in Caſe there ſhould be a Recovery againſt Newland he was without any Remedy againſt Dalmaſie, which laſt matter

ſeem-

ſeemed to ſtick with the Chancellor; whereto the Council for Horſeman offered that Horſeman did conſent that Dalmaſie might take out his Mony again at Barcelona, and to make any Inſtrument for that purpoſe; and they denied that Dalmaſie was the principal Merchant, for had it been declared to Horſeman that Dalmaſie was the principal Merchant, and muſt have ſought Remedy againſt him, Horſeman would never have let his Ship to Dalmaſie being a Stranger to him, and there is no probability that he would let his Ship to Fraight to one that he had never heard of, nor had any thing to do with; and inſiſted further, that tho' Dalmaſie were the principal Matter, and Newland his Agent, yet that will not concern Horſeman, unleſs Horſeman or his Agent had Notice of it, which they never had. And tho' Ford ſued Dalmaſie in Barcelona, that may not prejudice Horſeman nor Ford, becauſe he could not otherwiſe do, for by the Courſe of Merchants, the Receiver of the Merchandize is to pay Fraight upon the Receipt of the Goods. It was not poſſible for him to recover the Mony any other way, or againſt any other Perſon, Newland being in England, and Horſeman had inſtant Neceſſity for the Mony to relade the Ship back again, ſo the Suit was not a matter of Election but Neceſſity.

Foreign Judgments.

The Lord Chancellor. If the Cauſe had been fully determined at Barcelona, then —— but the Cauſe is not fully determined at Barcelona, for the Damages are not fully aſcertained. In Concluſion, he ordered that Horſeman ſhould proceed to a Tryal againſt Newland upon his Covenants, and therein give in Evidence the Non-payment of his Fraight, and what Damages he had thereby, and that Newland might give in Evidence of the mitigation of the Damage, and delivered no Opinion how far or whether Dalmaſie was the principal Merchant or not, but would conſider that when ſatisfied in that other Point. Thereupon the Plaintiff's Council prayed a Commiſſion to Barcelona to examine to that Point, which was oppoſed by the Defendants Council, being publication was paſt and nothing proved in the Cauſe of it.

Commiſſioner to examine after hearing on new Matters ſtarted at the Hearing.

Churchil. This Objection is raiſed by the Court, and aroſe upon the Debate, and was not in Iſſue before, and is to be tried by Letters Reſident in that Place, as well as here.

Chancellor. Take a Commiſſion, and examine to it, if you will conſent to go to Tryal next Term, and return the Commiſſion before the Term, and go to Tryal, whether the Commiſſion be returned or no. To which the Plaintiff and his Council aſſented; but moved firſt, that the Defendant might name Commiſſioners that the Plaintiff may not be delayed for want thereof. Secondly, That the Return of the Commiſſion might be by the Poſt and not in the uſual way may be allowed; and therefore the Lord Chancellor directed that the Commiſſion ſhould be delivered to Mr. Herne to ſend the ſame by the Poſt to Barcelona, and when Executed to receive the ſame back.

By the Poſt.

Company of Stationers Caſe. 28 Nov. 1681.

Printing. Injunction before Anſwer.

THE King granted to the Company of Stationers the Printing and Vending of Statute-Books. The Defendant cauſed the Statutes to be Printed in Amſterdam, and in great Bails and Quantities to be imported to ſell where they remained. The Plaintiffs exhibited a Bill complaining of it. The Defendants appeared, but the time of Anſwer was not expired till the 1ſt of October; I moved that the Books might remain at the Cuſtom-houſe till Anſwer. On Debate,

Statute-Books.

The Lord Chancellor ordered an Injunction to ſtay the Books there, not only till Anſwer, but in perpetuum; for the printing of the Laws was matter of State, and concerned the State. But for other Books, viz. The whole Duty of Man, and other like Books being imported and ſtaid, he left them to the ordinary Courſe.

Taulurier *contra* Ward. 19 December 1681.

Where one of two muſt loſe, he loſeth that truſteth moſt. Loſs. Fraud.

TAulurier had a Decree in Chancery for 600 l. which was to be placed out on Security in the Names of Markfield a Clerk in Court and of Buchannon; Markfield would not intermeddle, Buchannon received the 600 l. and the 3d of December lent it to Sir Richard Dutton, who entred into a Statute of 1200 l. to Buchannon for the payment. Taulurier was preſent at the lending. Afterward Buchannon, who was uſually employed by Ward the Defendant

dant in lending out her Mony, told her that a Friend of his had occaſion to borrow 600 l. but would not be known to any but to Buchannon, nor give Security to any but to him; but he (viz. Buchannon) would aſſign the Statute to her, &c. Whereupon the 29th of December ſhe took an Aſſignment by Deed from Buchannon of the Statute, and the Statute which remained in Buchannon's hands was delivered to Ward, and ſhe paid the 600 l. to Buchannon, who pretended he dealt for Sir Richard Dutton: After Buchannon died inteſtate; Taulurier obtained Letters of Adminiſtration of Buchannon quoad the Statute; Ward had the Statute; Taulurier could not ſue the Statute at Law, becauſe ſhe had it not to ſhew, and Ward could not ſue the Statute, becauſe ſhe was not Adminiſtratrix.

Now Taulurier ſues Ward in Chancery, one of them muſt be cozened, and the Queſtion was who ſhould be the loſer.

Mr. Solicitor pro Quer. We have Equity, we paid 600 l. we have the Title in Law by the Letters of Adminiſtration. Dangerous to take Security from a Truſtee without Enquiry.

But e contra, It was objected for the Defendant. Ward is not Plaintiff, but Defendant; ſhe demands not any thing from the Court; by the Grant of Buchannon we have at leaſt property in the Wax and Parchment; the Queſtion is, whether the Court ſhall take that from us, who have without any Fraud lent really our Mony? Beſides, Taulurier truſted Buchannon with the Statute, and Buchannon deceived her; and the uſual practice of the Court is, If a Creditor truſt the Scrivener with the Cuſtody of his Bond or Security, and the Scrivener receive and miſpend the Mony, the Creditor ſhall not recover againſt the Debtor, for it was his fault or neglect to truſt the Scrivener.

Reſp. pro Quer. If the Debtor takes not up the Security when he pays, &c. and the Creditor obtains the Bond, and ſo hath remedy at Law, there the Debtor truſts the Scrivener.

Winnington. The Statute is dated the 3d of December, Ward lent not her Mony till the 29th of December, and ſhe never ſpake with Dutton, which was a great neglect in her and a folly; if ſhe had enquired of him, he muſt have warned her, and how could ſhe lend the 29th of December, a Security the 3d of December?

Rawlinſon.

Rawlinſon. The Treaty with Ward was in the beginning of December, and the Security was preparing that while, till the 29th of December.

Chancellor. Do you prove the day when you firſt treated.

Rawlinſon. We prove it about the beginning of December.

Chancellor. Ward ought to have enquired of Dutton. Is there any Appeal brought from your granting the Adminiſtration?

Reſponſ. No.

The Chancellor decreed for Taulurier.

Sir Francis North *Plaintiff*, Champernoon *and others Defendants.* 17 Decemb. 1681.

22 Car. 2. *Ceſtuy que Truſt* in Tail ſuffers a Recovery, the Remainders are barred.

SIR Francis North purchaſed Lands in Eſſex, the Fee of ſome part of the Lands were in Truſtees, but the Truſt was after Debts paid to Richard Allington in tail with other Remainders over; Richard Allington the Ceſtuy que Truſt in tail ſuffered a Common Recovery with double Voucher to bar the Remainders over limited by way of truſt, but no legal Tenant to the Præcipe, for the Freehold was in the Truſtees who were no Parties to the Recovery. And the great Queſtion was, Whether the Recovery did bar the Remainder in truſt, for the Plaintiff's Title was under that Recovery.

The Decree is in theſe words: His Lordſhip upon long debate of the matter on hearing what was alledged by the Council on either ſide touching the ſame, declared, That he was fully ſatisfied that the ſaid Recovery did ſufficiently bar all Remainders depending upon the Eſtate tail of Richard Allington, who ſuffered the ſame, it being a general Rule, that any legal Conveyance or Aſſurance by a Ceſtuy que Truſt ſhall have the ſame effect and operation upon the truſt, as it ſhould have had upon the Eſtate in Law in caſe the Truſtees had executed their truſt, otherwiſe Truſtees, by refuſing or not being capable to execute their truſt, might hinder the Tenant in tail of that liberty to diſpoſe of his Eſtate and bar the Remainders, which the Law gives him as incident to his Eſtate, which would be manifeſtly inconvenient, and tend to the introducing of Perpetuities, and doth therefore think fit, and ſo ſeemed

ſo order and decree that the ſaid Defendants Arthur Champernoon, Alice Champernoon, and Elizabeth Way, in purſuance of certain Articles executed by them to the Plaintiff for purchaſe of the Manor and Rectory, and Advowſon of the Church of Harlow, &c. in the County of Eſſex, do forthwith make a Conveyance of the ſaid Manor and Premiſſes to the Plaintiff and his Heirs, and that the Defendants Anthony Cozen and Elizabeth his Wife, (who is Daughter and Heir of the ſurviving Truſtee) in whom the Eſtate in Law of the Premiſſes reſteth, and the Defendants Humphrey Williams and Dorothy his Wife, and Thomas Dorſton Senior, and Bridget his Wife, who are the Heirs at Law of the ſeveral Teſtators, and are to receive Legacies upon the ſaid Sale, and all other Parties concerned do join therein. And it is alſo further ordered and decreed, that the Lord North do pay the Debts and Legacies, &c. ſome being Infants, and their Legacies were to be paid to their Parents on their own Security, which was to be allowed by a Maſter, and thereon the Plaintiff to be diſcharged of it.

If a Commiſſioner in a Cauſe be himſelf to be examined as a Witneſs, he muſt be firſt examined; and if others be before him examined in his preſence, he cannot be afterwards examined, having heard the former Examinations: And for that Cauſe the 17th of December 1681. a Commiſſioner who had ſo done, came up afterwards, and was examined in Court. His Depoſition was ſuppreſſed ex motione Mr. Hutchins.

Anonymus.

An Account referred.

THE Maſter examined one Witneſs Three times to the Matter of Account. Witneſs. Examination.

Ordered, The Depoſitions be ſuppreſt.

Exton

Exton, &c. *contra* Turner. 17 Decemb. 1681.

Witneſs. Reviver.

THE Plaintiff Cornelius Burton and ſeveral other Creditors of John St. John, ſued Martha Turner, the Defendants inteſtate, examined Witneſſes, and the Cauſe heard. The main queſtion at the hearing was whether the Defendant at the time of his Purchaſe of the Manor of Sapcot, had notice of the Plaintiffs Title? And that point being directed to a Trial, a Verdict paſt for the Plaintiff. But Complaint was made to the Court, that the Plaintiff at the Rolls, after hearing, got an Order ex parte, to ſtrike out the name of Cornelius Burton; and that being done, the ſaid Cornelius Burton was uſed as a Witneſs at the Trial, which ſurprized the Defendant, and the Court ſet aſide that Trial, and Cornelius Burton again made Plaintiff afterwards. The Bill abated by the death of Martha Turner, and the Defendant Turner is her Adminiſtrator. Exton and ſome of the other former Plaintiffs, without Burton and two others, formerly Plaintiffs, exhibit a new Bill to revive the former Suit. To which the Defendant pleaded the Order, that Burton ſhould be Plaintiff, and that a Reviver of the former Bill makes Burton Party to the Suit; and this is an Act by leaving him out now, to make him by a trick to be a witneſs, and the Suit cannot be revived in part, but the whole Proceedings, viz. Bill, Anſwer, &c. and all Orders muſt ſtand revived, which the Plaintiffs Counſel did agree. A ſecond point was, The Bill was an original Bill, for having ſet forth the Premiſſes, and the direction to try notice or not, they now alledge that Burton had releaſed his Intereſt to the Plaintiffs and Truſtees, and that they had ſeveral material Witneſſes aged and infirm, who may die before the Trial, and pray Anſwer, and that they may examine their witneſſes. The Defendant alſo demurred to this part of the Bill, and was over-ruled to anſwer within a week, or to pay Coſts.

Nota. Where divers are Plaintiffs, and the Bill after hearing abates, ſome of them without the reſt may revive the Cauſe.

Exami-

2d. Examination after Publication and hearing in a Bill of Reviver, in the new Cause; yet it was declared and agreed by Sir John Churchil, &c. of Council with the Plaintiffs, that such Depositions could not be read in this Court, but the Cause being abated by Act of God, viz. the death of the Defendant, it's proper to examine Witnesses in order to the Trial, which the Court hath already in the former Cause directed; and those Plaintiffs who now are not Plaintiffs to revive the Cause, have released, and the Examination of Witnesses is only to use them at the Trial, not here. Quære, How it shall judicially appear to the Court that there are such Releases? and Quære how Burton's, or any others who cannot be read in this Court, nor could not have been read if examined, shall be made use of in trial of an Issue being meerly matter of Equity, as notice of a Trust, &c?

M DE

DE
Term. Sanct. Hill.
Anno Regis 33 & 34 Car. II.
In
CANCELLARIA.

Harvey *contra* Harvey. 18 January 1681.

Examination Contempt.

SIR Thomas Harvey the Plaintiff had a Decree against the Defendant, for the Surplus of the Estate of Sir John Harvey as Residuary Legatee: The Process to discover the Estate went so far as a Sequestration, and Sir Thomas Hanmer was prosecuted on contempt, for that the House wherein the Testator's Goods were, being secured, and the Trunks by former Order lockt and sealed, Affidavit was made that a Smith in disguise on Friday broke open the House, that then the Chests, &c. were opened, and carried away, and Goods, &c. and that Sir Thomas Hanmer was then there with others, and he being now prosecuted for the contempt, was ordered to be examined on debate.

Conyers *contra* Hamond. 7 February 1681.

Place sold and lost, the Mony restored.

THE Defendant sold a Commissioner's Place in the King's Troops for 400 l. to the Plaintiff, who after he had enjoyed the Place three Years, was turned out, and another put in his room; and as the Bill supposed, by the Defendant's means or procurement, without any fault of the Plaintiff, which was not proved, it was insisted on by the Defendant's Councel.

1. This

1ſt. This is not a Cauſe proper for the Court to relieve: A Contract of this nature being a Bargain for a Place or Office of publick Truſt and Concern, viz. to take Muſters, &c. and though being concerned in Military Affairs, is out of the Statute, yet the King may be abuſed, and falſe Muſters allowed.

2dly. He was diſplaced by the Commiſſioners of the Treaſury.

3dly. Had enjoyed the Place and Salary 5 s. per diem, and made other Advantages: And the Cauſe had been heard before the King at Council-table, and no relief given him.

Lord Chancellor. I wiſh a Law were that ſuch Bargains might not be, they occaſion deceit to the King, &c. but ſeeing the King hath not diſallowed them, the Plaintiff ſhall not loſe his Mony, and therefore what the Defendant hath received, he ſhall repay.

Churchill in the debate took a Difference between this Bargain, for a Place ſubject to ſuch Contingencies, where the Party may be removed at pleaſure, and a Bargain of Land on a Defeazable Title: Ad quod non fuit reſponſ', but decreed it ut ſupra.

Perrie *contra* Roberts. 11 February 1681.

General payment where two Debts.

A Was indebted to B. by Bond, and C. bound as Surety for A. and A. was likewiſe indebted to B. by Contract in other Mony. A. and B. came to account of both Debts, and ſtated in toto to be 84 l. A. after in ſatisfaction of his debt, makes over certain Goods of leſs value; but there was no Declaration, whether the Sale or Mony for the Goods was to be in part of one debt or other, but generally. C. the Surety would have it paid on the Bond, and thereby to diſcharge him. B. the Creditor would take and make uſe of it as in ſatisfaction of the Contract debt; for A. was inſolvent, and ſo elſe he might loſe his debt; and rather than ſo, he ſhould apply the general payment to what debt he pleaſed, viz. to the ſatisfaction of the debt by Contract, for which he had no other Security; or elſe A. being now grown inſolvent, he muſt loſe it; and it were hard when he hath a juſt debt in Law and Equity to be er-

pounded out of his debt by Interpretation of a payment generally made.

Solicitor Finch. The Sale was a further Security for both debts, and so for his Bond-debt he hath two Securities, the Sale and the Bond; and he who hath two Securities may help himself upon either.

Lord Chancellor. If there had been two debts, and a Sum of Mony be generally paid, the Creditor may elect and chuse after to what debt to apply it when on payment the Debtor made no distinction how he paid it; but this payment being pursuant on a precedent Account of both debts, the payment shall be intended according to the Account, viz. on both debts, and so shall be proportioned ratably on both debts.

The Master of the Rolls had so ordered before, and his Order being now disputed, was confirmed on re-hearing, and the Surety pro rata discharged.

Anonymus. 18 February. 1681.

No discovery of Witnesses.

MOtion was made that the Defendant might discover the Names of the Witnesses to a Deed; by which the Defendant claimed by his Answer, which the Plaintiff by Bill charged to be antedated; but the Antedating denied by Answer.

Lord Chancellor. That may tend to prepare or otherwise to tamper with the Witnesses, and therefore denied the Motion; but if there were apparent Suspicion, it may be.

Popley *contra* Popley. 20 February 1681.

Alience eased by the Executor.

DEclared by the Lord Chancellor, That not only the Heir in case he be charged with debts of the Ancestor; but a Devisee of the Land shall be unburthened tho of a debt lying on the Land by the personal Estate in the hands of an Executor or Administrator, and so shall a Devisee of a Mortgage. In the principal Case the question was, whether a Sum of Mony were a debt, or duty in Law or Equity, and being a Charge in Equity, a Decree was that it shall be paid out of the personal Estate, and lessen the Widows customary Moiety in the Province of York:

Debt in Equity.

If

If it were a debt in Law or Equity, then it should come in and be deducted in the first place, and lessen the Widows Moiety; and being here a duty in Equity, it was so decreed: But a Legacy could not be so deducted.

Howell *contra* Waldron. 24 February.

A Legatee Infant sueth in a Court Ecclesiastical, and pending that Suit, sueth in Chancery: The former Suit depending being pleaded, the Plea was disallowed, for there's no such Security for the Infant's advantage as here, and possibly not for Interest if placed out, and for bringing in account here, &c. *Lis pendens.* Court Ecclesiastical.

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Termino Paſchæ
Anno Regis 34 Car. II.
In
CANCELLARIA.

Anonymus. 26 April 1682.

William Bullock poſſeſt of a Leaſe for 1000 Years, on a Treaty of Marriage between him and Sir John Knight, to be had between Henry Son of William, and Bridget Daughter of Sir John Knight, aſſigns the Leaſe to Sir John, &c. on truſt; Firſt, William to receive the Profits till the Marriage, then Henry to receive the Profits ſo long as he ſhall live, and no longer; then after his death Bridget to receive the Profits during her life, and no longer; and afterward the Iſſue of the ſaid Henry and Bridget, between them to receive the Profits ſo long as any Iſſue of their Bodies ſhall continue, with Remainder over. The Marriage is had, Iſſue born, Henry aſſigns all his Intereſt to his Father, the Iſſue dieth, Bridget dieth, William takes Adminiſtration of Henry, Sir John Knight takes Adminiſtration of Bridget and the Iſſue. The queſtion is quid Juris on a Bill exhibited by William and Sir John Knight, Truſtee and Adminiſtrator of Bridget, and the Iſſue.

On debate the Lord Chancellor ordered the Aſſignment to be brought to him, (for ſome Differences were alledged to be in the words of it) and when he had peruſed it, he would declare his Opinion.

1. The main queſtion was, whether as this Caſe is, the Iſſue were a Purchaſer, or whether it were in the nature of a Limitation.

2. If

2. If the Aſſignment being ut ſupra, paſt away the Intereſt of the Wife, if it were a limitation, 1ſt. In regard of the Coverture, viz. the future Intereſt and Poſſibility (for it being made for her Preferment in nature of a Jointure, it was agreed it could not hurt her during her Life.) But 2dly. whether this Poſſibility were grantable.

The following Caſe cited by the Lord Chancellor *in a Cauſe of* Bradburne *contra* Amand.

THE Lord Dacres imployed Crompe to purchaſe Land for him, and to take up Mony to pay for it, which Crompe did, and took the Purchaſe in his own Name; the Lord Dacres ſued Crompe in Chancery, to have the Lands on payment of the Monies, but Crompe on other occaſions had Mortgaged, Ingaged for, and on behalf of the Lord Dacres, and inſiſted for them alſo. And the Lord Dacres could not have a Decree, but muſt pay the one Monies as well as the other by Decree of the Lord Bridgman. Pay all or none.

Hele *contra* Hele. 28 April 1682.

THE Bill was by the Plaintiff, Widow of Sir Henry Hele, to have a Jointure of 300 l. per Annum ſettled on her, and the main Queſtions on the Caſe were two, viz. Sir Thomas Hele had three Sons, Thomas, Samuel, and Henry the Plaintiffs Husband, and a Brother Richard, Father of the Defendant Richard Hele. The Eſtate was ſo ſettled, that Henry Hele the Plaintiffs Husband was ſeized in Fee-ſimple of ſome Lands, and of Lands in Somerſetſhire which were his own Inheritance; and on Treaty with Mr. Elliott Father of the Plaintiff, for a Marriage between him and Jane the Plaintiff, Daughter of Elliott, it was agreed the Marriage, &c. and near 3000 l. Portion; 1900 l. of the Portion was paid, and the reſt ſecured, and Mr. Elliott took a Bond of 6000 l. to himſelf in truſt for the Plaintiff. The Condition was in effect to ſettle on Jane 300 l. per Annum of Lands, in the County of Devonſhire, Cornwall and Somerſetſhire, of the value of 300 l. per Annum, but no particular Lands expreſſed; Samuel the elder Brother of Henry, had by his Will ſettled divers Lands on Truſtees (Defendants alſo) and gave power to Henry to make a Jointure to ſuch Wife as he ſhould Jointure. Marriage.

ſhould marry of the Barton of Fleet Damaroll, (but he was Tenant in tail of all) that Barton (except the Capital Meſſuage and ſome Lands parcel thereof value 50 l. per Annum) was entailed, ſo that Henry who inherited that Intail, had only ſuch Power on the Capital Meſſuage and thoſe excepted Lands.

Henry makes his Will, and deviſes all the Lands which he had to Richard the Defendant in Tail, and dieth without Iſſue, the Lands which Richard hath by the Will, &c. are of great Annual value. But the Plaintiffs Portion 3000 l. paid, and no Jointure made, for which ſhe now ſueth; and two Objections (intra alia not ſo conſiderable) were made againſt her, viz.

1ſt. Tho' it be charged in the Bill that there was an Agreement precedent to the Bond, that 300 l. in Lands ſhould be ſettled in Jointure, and after Bond, &c. to ſettle it is particularly denied by the Anſwer and inſiſted, and no Proof made of it, and therefore the Obligor had Election to pay, or ſettle and avoid payment by Settlement, and by chance might ſo declare, viz. that he would not be bound to ſettle, but would be at Liberty, and we are content, the Plaintiff take advantage of the Penalty, but are not to be forced to the one, if content to ſubmit to the Penalty. Henry Hele could have no more impoſed, a fortiori, nor the Defendant.

Reſp. 1. The Bond is but a Security for the Jointure to be made, and of Neceſſity ſuppoſeth a precedent Agreement that ſuch a Jointure ſhould be made: Firſt, it is agreed what ſhall be done: In the ſecond place, the Treaty and Agreement is, how that which is agreed on ſhall be ſecured, and in ſuch Caſe the Security commonly is penal, but the penalty can never be demanded in Equity, the Party performing that, for non-doing whereof the Security or Penalty is given.

2. It is unreaſonable that the Obligor ſhould be at Liberty never to perform the thing ſecured, and the Perſon ſecured, not able to ask the Penalty as indeed he can never demand it in Equity. If the Obligor ſhould ſue in Equity on the loſs of his Bond to have the Penalty, it would be Pain, and if he in Equity ask in the Diſjunctive, that he might either have the Penalty, the 6000 l. or the Jointure

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(ſuppoſing the Lands were in truth certain) Chancery might decree the Jointure, but would never decree the Penalty, tho' the Cancery would perhaps impoſe ſome other reaſonable Penalty on Non-obedience, but certainly never decree the 6000 l. unleſs the true value on Diſobedience amounted to as much.

3. And it is not Reaſonable nor Equity, that in Caſe of a Marriage Agreement, and the Portion paid, that ſtrictneſs of Law ſhould hold on one ſide, and the Benefit to avoid it too, and the other ſide have no liberty; but if he ſhould attempt to have the advantage in Law of the Penalty, to be ſtopt in Equity when the other Party would, and yet if he would be content with Equity, not to be ſuffered to ask it tho' it be due.

4thly. The Caſe is the ſame in Equity, if the Condition had been to have had certain Lands for Jointure, as when it is general; I ſay the ſame as to this Objection.

Therefore the principal ſcope of the Parties being for a Jointure, and the clear Oeconomy (pardon the Expreſſion) of the whole Agreement being that, without all doubt the one or the other ought to be had, viz. the Jointure or the Penalty. If things be brought to that paſs that one of the two is become impoſſible (that is, impracticable, or as Circumſtances of the particular Caſe are, not accompliſhable) then that part of the Agreement which is feazable ſhall be performed.

Eſpecially if it fall out to be in ſuch ſtate or Condition, by the Act, Fault or Negligence of the Party who had once Election to do otherwiſe; for ſuch Act or Neglect determines the Parties Election at Common-Law, and in Reaſon and common Juſtice; yea, tho' it fall out by the Act of God or of a Stranger, and without the Parties fault; wherein I hold the Differences to be two; Firſt, between an Agreement or Covenant to do in the Diſjunctive one thing of two, and where there is a penal Agreement to do one thing of two, as if I covenant to enfeoff a Man, or make a Jointure in poſſeſſion of B. or W. and one of them is carryed away by inevitable inundation or the like, yet I muſt do the other.

This is at Law where no Remedy is given but for the Penalty: But in that Caſe, if the Agreement were without Penalty, and the Penalty for Security, and to be reaſonably intended ſo to be, there tho' an Impoſſibility

of one happen by the Act of God, the Chancery will pass by the penal and formal part, and insist on that which was the principal thing secured by the Penalty: If the Penalty were the Principal, it were demandable in Equity.

Now in this particular Case as the Circumstances of it fall out, Henry Hele who was to make the Jointure, is fain into a Condition as that he cannot perform the one part, viz. the Penalty; for it is agreed that his Debts exceed his Personal Estate, and his Land he hath devised away, so that he cannot, morally considered, pay the 6000 l. because there is nothing left; the thing cannot be done by him, so he hath no Election to do it being in that Condition.

Object. 2. The second Objection is of more weight, viz. the Covenant is general, not to settle Black-Acre of 300 l. value per Annum, but only to settle 300 l. per Annum in Lands, so as Henry Hele might settle any Lands in those Counties, and the Chancery could never with Justice compel him to settle this or that Land, if he would settle 300 l. per Annum any where within those Counties.

I agree it so, as long as he could any way perform and settle 300 l. per Annum, but if he be once reduc'd to such Condition and Circumstances as that he could not possibly perform, and such Impotency appear to the Court Judicially, the Court may Chuse for him and inforce him to a particular, as if the time of Settlement were past, and he aged or the like, the Court may apply the general on his particular Lands, as if he were an Unthrift, &c.

Object. 3. But here the Land is in Richard the Defendant as a Purchaser, not as Heir, for he comes to the Land by the Will of Henry Hele, not as Heir to him: Tho' Henry was bound, and his Heir would have been bound had the Lands descended to him as Heir; Yet also in that Case, if Richard had alienes the Land before Debt brought on the Bond, the Heir of Henry the Obligor should not have been bound, and by no Rule of Law or President of the Court is an Assignee of Land bound by a Personal Covenant, and the Court will not make new Presidents.

Resp.

Reſp. The ſtrength of this Objection lyeth in this, viz. That the Agreement is not to ſettle any Lands in particular, as Black Acre, but generally any Lands in Devonſhire, Cornwall, &c. So as it is true, no Lands of Henry were tyed by this Agreement, and therefore how can any of them be bound in the hands of his Deviſee?

Examine why is Henry and his Deviſee bound, in Caſe the Agreement had been of Lands in particular, and Richard Deviſee of them. It is clear, Richard ſhould have been bound in that Caſe, and ſo ſhould a Purchaſer of them if he had Notice; yet in that Caſe the Land is not bound by the particular Covenant, no more than if it were general, elſe every Alien tho' for a valuable Conſideration and without Notice, ſhould be bound but are not.

So that the particular Covenant doth bind the Covenantor in Conſcience, and the Covenant general doth bind him as well and as much.

This Caſe is now reduced to that plight, that Henry who made this general Covenant had no means poſſibly to perform the general at the time when he made the Deviſe of the Lands now in Queſtion, but out of theſe Lands, for he had no Perſonal Eſtate, either to ſatisfie in Money, or to procure or purchaſe other Lands of the value. He makes his Will, he is on his Death-bed, ſhall the Court imagine that he being obliged on ſo great Conſideration of 3000 l. received by him in Moneys, and Security for the reſt, and having no other means poſſible but by thoſe Lands to perform his Covenant, and that to his Wife whom he had lately marryed, and never offended him, to give his Lands to a Brother's Son, and break his Bond and Conſcience, and ruin and beggar ſuch a Wife?

I ſay, that being he had no other means but by theſe Lands to perform his Covenant, the Court ſhall do what in Conſcience he ought to have done, and lay Hands on theſe Lands, ſeeing that there is left no other poſſibility.

Had Henry Hele been alive, he ſhould be decreed in ſuch Circumſtance to ſettle theſe Lands, viz. 300 l. per Annum out of them; as the Court if he had been brought to a hearing, would not have given him time to purchaſe other

Lands, ſo the Court at leaſt would lay hold on theſe, if in convenient Time or during Life he did not, which differs a Deviſee from the Heir; had he left them to Richard who was his heir he had been bound, he leaves them by his Will to him, it is the ſame in effect.

Object. The Common Law binds not the Deviſee, and it is a breach of Law to bind the Alienee, and there is no Preſident, it will be a new one.

Reſp. Is it not againſt Law, or to ſay better, is it not more than the Common Law can do, to decree it, if the Agreement were for particular Lands? And yet at this day there would be no ſcruple in that Caſe: The Objection of the Law is as ſtrong in the one Caſe as the other; in both the ſame.

4 & 5 M. There the Covenant was by Indenture to ſettle divers Lands (per noſme:) It is there reſolved, not only that the Eſtate was not ſettled in Law, but alſo Cui nul Subpœna voile giſer pur luy come pur Ceſtuy que uſe de compeller l'Eſtate d'eſtre execute quia party ad Election al Common Ley per action de Covenant, In that and this Caſe.

Obſerv. 1. No difference where the Covenant is by Name and where generally at the Common-Law.

2. That ſurely 4 M. there was no Preſident then where the Agreement was per noſme.

3. That yet it is indubitable at this day to decree of particular.

4. That therefore when 'twas firſt done after 5 Mary, the Court did not forbear to decree, tho' no Preſident.

5. Nay, yet the Court hath gone further to the Heir than to the Aſſignee, tho' a purchaſor on valuable Conſideration if he had Notice, and it is no defence for him to ſay that the Covenantee had Election to ſue by Covenant at Common Law.

It is harder on the Plaintiff, for ſhe hath no Remedy: Indeed ſhe may ſue but to no purpoſe, for Richard the Deviſee and Executor tells us and your Lordſhip by his Anſwer, viz. that he hath no Aſſets.

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The Common Law relieves not particular Caſes againſt the general Rule, but in Chancery every particular Caſe ſtands on its own particular Circumſtances; and tho' in general the Law will not relieve, yet Equity doth, ſo as the Example introduce not a general Miſchief. Common Law relieves not againſt a general Rule, but Chancery does.

Here is a Cauſe of as great Equity, of as good Conſideration (Marriage and Portions) as can be, as ſingular in Circumſtance, where the whole Eſtate the Defendant hath comes to him by meer Liberality. 1. The Liberality of him who was not pro arbitrio to make the Jointure, but ex juſtitiæ merito.

This Caſe is not like to be a Preſident.

Company of Stationers, 29 April. Ante.

Injunction. Prerogative. Statute.

THE King granted the ſole Printing of Engliſh Bibles and Statute-Books to the Plaintiff: The Defendant traded with certain Dutchmen, who printed many thouſands of them in Holland, and the ſame were now in the Cuſtom-houſe; and formerly on a Bill exhibited in Chancery, the Plaintiff had an Injunction againſt the Defendant not to import or vend the ſame Books, in regard it was not only a breach of the King's Prerogative, but of great and publick conſequence for Strangers to print and vend in England our Statutes and Laws, if ſafely done. And now I moved for Explanation of the Order, &c. and Injunction; for the Defendant had acknowledged Judgment, or Judgments were obtained againſt him, and alſo a Commiſſion of Bankrupt was proſecuting, and there was pretence that thoſe who came in by ſuch Judgment or Commiſſion, ſhould not be bound by the Injunction.

The Lord Chancellor declared they ſhould be bound; and further ordered, that in regard divers of the Books were in the hands of the Cuſtomers, the Cuſtomers ſhould ſuffer none of them to be removed thence: And that they firſt acquaint the Court, and an Injunction granted accordingly.

Row

Row *contra* Tillier.

Portion. THE Father seised in Fee of Copyhold Lands, surrendred them by the hands of two Tenants, viz. J. S. and his own Brother Tillier Father of the Defendant, and now dead, to the use of his Brother Tillier and his Heirs, on condition that Tillier paid to Katharine, the only Child of the Survivor, when she comes to the age of Twenty one, 200 l. Provided if his Daughter died without Heirs of her body, then Tillier the Brother should have the 200 l. The Father Survivor died, leaving his Daughter an Infant not two years old. The Daughter at 18 years married the Plaintiff, and had Issue George, and died when she was 30 years and an half. The Son died an Infant; the Plaintiff, Husband of Katherine, the Daughter, and Father of the Child, takes Administration to them both, and sueth the Son and Heir of the Cestuy a que; the Surrender was made for the 200 l. who insists that the Money is not due, because the Daughter never came to Twenty one, according to the Condition. Pasch. 1682. the 200 l. decreed to the Plaintiff.

Condition.

The Father gave his personal Estate of good value to his said Brother, but nothing else of his own to his said only Child.

Harding *contra* Edge. 13 May.

Charitable Uses. Decree. Alienee. A Decree was made by Commissioners on the Statute of 43 Eliz. for Charity, against Harding; who took Exception against it in Chancery, and then being seised of Lands, conveyed them to raise Portions for his Children after the Commissioners Decree was confirmed in Chancery, the Conveyance was with power of Revocation: This shall not hinder Execution for the Money decreed, but the Lands aliened shall be sequestred for the Money, and a Scire facias against Harding's Heir; for the Exceptant died after the Decree confirmed; the Conveyance was mean between the two Decrees.

Brooks

Brooks *contra* Bradley. 11 May 1682.

THE Bill was to have a diſcovery of Gold, and a great quantity of Goods which the Defendant took out of the Plaintiffs Ship; which Goods and Ship the Defendant took on the Sea. African-Company.

The Defendant ſets forth, The Charter made by the King to the African-Company of the ſole Trade in thoſe Parts on the Guinney-Coaſt, and impowering them to ſeiſe the Ships and Goods of any that ſhould trade in thoſe Parts: and juſtified under the Patent what he did, and denied to make any diſcovery.

The Plaintiffs Counſel offering to wave the Plea, and demurrer:

Lord Chancellor. If you can help your ſelves at Law do ſo, but I will give no aſſiſtance to diſcover here in prejudice of the King's Charter.

Pamplin *contra* Green. 11 May 1683.

THE Bill is againſt an Adminiſtrator and other Perſons, to have Diſtribution of the Inteſtates Eſtate, according to the late Statute; which Statute the Defendant pleaded, and that by that Statute the Ordinary is made the Judge to diſtribute, and is appointed to take Security: And therefore the Plaintiff ought to ſue there, and not here. Diſtribution. Juriſdiction Eccleſiaſtical. Stat. 27. Car. 2.

The Lord Chancellor over-ruled the Plea, and order'd that the Defendant's ſhould Anſwer.

Sir Charles Lee & *Uxor*, *contra Sir* John Boles, *Adminiſtrator to his deceaſed Wife.* 1682.

THE Defendant had Verdict and Judgment againſt the now Plaintiffs, who now after the Judgment ſought to be relieved againſt the Judgment, and the Caſe on hearing was, viz. The ſaid Sir John Boles became a Suitor to the Plaintiffs Daughter, who was informed that his Eſtate in Lands was 1700 l. per Annum, and free from

from all Incumbrances, except 7000 l. for a Daughter's Portion, to his Daughter by a former Wife, then ſick. The Mother the Lady Lee informed him that her Daughter's Portion, left her by her Father deceaſed, was 2000 l. but ſhe would add 2000 l. more, and ſo pay the ſaid Boles 4000 l. and would give her Daughter a 1000 l. more, and 60 l. per Annum for two Years, if his Eſtate was ſuch; and Articles were mutually executed, by which it was in the head, and other places of the Articles, recited and expreſſed that the Daughter's Portion was 4000 l. but there was a diſtinct Article, that if no Act were done or ſuffered before the firſt of November 1668. whereby the Heir Male of Sir John Boles by the Plaintiffs Daughter, might be hindered from enjoying the Lands by the Articles agreed to be ſettled on them, then the Mother would pay to Sir Vincent Corbet and Robert Corbet, 1000 l. and 60 l. per Annum, for two years for the ſole and proper uſe of her Daughter, and Sir John Boles not to meddle with it: There were other Articles for Jointure, &c. and Settlement on the Heirs Males; but the Lady finding that the Lands were incumbred, would not ſuffer the Marriage to proceed. Thereupon Boles and the young Daughter agreed with the Mother to releaſe the 1000 l. and did make a full Releaſe and Diſcharge thereof, referring to the Articles touching the payment thereof: But this though in writing, and ſubſcribed by Sir John Boles and the Daughter, was not ſealed; the Daughter was of full age; the Marriage was had, but the Lands were incumbred, 2000 l. of the Portion being unpaid, a Suit was in Chancery; which by Mediation of the Court was compoſed, the 2000 l. paid, Lands of 1200 l. per Annum ſettled, and ſo all things quiet: But the Wife being dead, Sir John Boles takes Adminiſtration, and ſues Sir Charles Lee and his Lady for the 1000 l. in an Action of Covenant, whereon the ſaid Releaſe (not being under Seal) could not be pleaded; but the 1000 l. not being payable by the Articles unleſs the Land was free, ut ſupra; and finding a Mortgage made by the Father of Sir John Boles that incumbred the Lands, and that Sir John Boles always received the Profits thereof, which gave occaſion to the Plaintiffs Heir to believe thoſe Lands to be Sir John Boles's, and they by way of bar to the Covenant; that matter was pleaded, viz. that thoſe Lands were incumbred, and ſhewed how: But it being inſiſted then that the ſaid Lands were not the Lands of

Verdict.
Miſtake.

Sir

Sir John Boles in Law or Equity, the Mortgage being unſatisfied, for they were the Mortgagee's Lands in Law and Equity till he was paid, and ſo the Article in generality comprehended not thoſe Lands.

The Verdict paſt for the then Plaintiff, and the Note was given in evidence to the Jury in mitigation of Damages: therefore the Defendant inſiſted, that after Verdict and Judgment in an Action of Covenant, wherein damages are only recovered, the Suit is not to be allowed in this Court.

1ſt. For the now Plaintiff it was preſſed, that this 1000 l. was a voluntary Gift and Liberality of the Mother, and given and covenanted to be paid only on precedent condition, viz. if no Incumbrance (that might prejudice the Heir Male) were, but now the Lands appeared to be incumbred.

2dly. Though in ſtrictneſs of Law an Agreement to diſcharge a Duty created under Hand and Seal, is not good in Law; yet in natural Juſtice it is all one as to the Conſcience of the Parties, where there is no Fraud or Practice, nor Surpriſe in obtaining it, much more when there is a Conſideration or juſt Reaſon for it, as here there was, viz. conſenting to the proceeding of the Marriage, which was juſtly ſtopt by the Lady, being informed of the Incumbrance. And it is adjudged at Law that in conſideration the Father or the Mother ſhall conſent to the Marriage of a Child, it is good to raiſe a Uſe or Action on the Caſe.

3dly. The reaſon why the Law requires a Seal and Solemnity is, that the thing be certi juris, and to prevent ſurpriſe, of which here is no doubt. The Defendant confeſſeth the Fact, though he ſwears alſo that he meant not to abide by it, or to that effect, ſo the Fraud lies on his ſide; he meant not to do in effect what he did in ſhew do.

4thly. The Verdict was on a Miſtake, whereinto the Plaintiff was led by the Defendant, for he kept poſſeſſion, and received the Rents, &c. which made the Plaintiff take him for Owner of the Land; and the Plaintiff now, then Defendant, could at Law aſſign but one breach, viz. one Incumbrance, though there were many, and are now proved; and if any Incumbrance were, he had no title to the 1000 l. and it's no reaſon that the ſtrictneſs of the Law

tying the Plaintiff to one breach, ſhould intitle the now Defendant to that to which now it appears he never had title, becauſe there were more Incumbrances, ſo in truth he never had title.

The Lord Chancellor after long debate diſmiſs the Bill, principally becauſe the Plaintiff did not come into the Court till after the Verdict and Judgment: And the Chancellor took notice that the Settlement made was more beneficial than the Settlement propounded in the Articles; but that was ordered after the Condition broken, viz. not diſcharging the Incumbrance Six years after the time when, &c.

Rauſon *contra* Sacheverel. 13 May.

Pay all. Feme Covert. Mortgage. Surcharge.

SAcheverel and his Wife ſeiſed in Right of the Wife, by Fine and Deed mortgaged them for 340 l. which was not paid at the day, but 200 l. part was paid afterward, and then the Mortgagor had occaſion to borrow, and did borrow other Money of the ſame Mortgagee. The firſt Money, viz. the payment of the 200 l. was indorſed on the Mortgage-Deed; the Wife in preſence of the Husband made account of what was due on the firſt and ſecond Loan, for both by Agreement were to be on Security of the Mortgage: The Wife died, but no new Fine levyed on the ſecond Loan.

And therefore it is objected, that neither her nor the Husband's conſent, ſhall bind her Heir.

The Lord Chancellor e contra: For the Mortgagee hath good Title in Law, and as much Equity to the Money as the Heir hath to the Land, pour que, &c.

Brond *contra* Brond. 19 May.

Jointreſs redeems, &c. paying a third part. Mortgage. Baron and Feme. Limitation.

THomas Brond late Husband of the Plaintiff, in conſideration of 3000 l. ſettled, inter alia, Houſes in Bread-ſtreet, in all of the value of 350 l. per Annum, to the uſe of himſelf for life, Remainder to the Plaintiff for life for her Jointure, with Remainder over. The Houſes Anno 1666.

1666. were burnt, and the Husband being unable to rebuild them, without borrowing Money, perſwaded the Plaintiff to join with him in a Fine ſur conceſſit, for a long Term of years, to ſecure the Money to be borrowed; and agreed with the Plaintiff that it ſhould be no prejudice to her, but that ſhe ſhould redeem, paying the Intereſt of the Money borrowed. 600 l. was borrowed of Alderman Jefferies, and a Fine levyed to him for 99 years by the Plaintiff and her Husband. Jefferies redemiſed the Coſts of the burnt Houſes to the Husband for 98 years, rendring 36 l. per Annum, and to repay the 600 l. at a time, &c. the Houſes are rebuilt by the Husband, who afterwards ſettles them and other his Lands on himſelf in tail, to the Heirs Males of his Body, the Remainder in tail to the Defendant his Brother, charged with Portions of 3000 l. to his Daughters, and dieth Anno 1674. and made the Defendant his Executor, being his Brother, his perſonal Eſtate but 182 l. ſhort of his debts. The Defendant was bound for him in Bonds to the value of 1600 l. and entred on the Houſes, paid the 1600 l. and took up the Bonds, and alſo paid the Intereſt of the 600 l. borrowed till 1681. and then the Plaintiff exhibited the Bill to redeem, for that the Houſes yield 180 l. per Annum, and the Rents received by the Defendant were more than the Money borrowed, and her Jointure now left but 200 l. per Annum, beſides the Houſes; and prays that ſhe may redeem, paying proportionably, and hold over till that ſhe be repaid, with Intereſt.

E contra, It was alledged, and the truth was that ſhe never queſtion'd the matter in 13 years; during all which time the Defendant paid Intereſt, and paid the 1600 l. which was the Brother's debt, and the Houſes redemiſed, came to him as Executor of his Brother, and were Aſſets in his hands; ſo that in Law the ſame was liable to pay debts, and in Equity he ought not to be liable to his Brother's debts; and the Plaintiffs Title was but a Parol Agreement between Husband and Wife, and the Defendant never had notice of any ſuch Agreement till this Bill exhibited Anno 1681.

The Plaintiffs Councel replied, That when ſhe joined in the Fine with her Husband, the Equity of the Redemption did properly belong to her, and her Husband could not diſcharge it by any ſubſequent Act or Agreement be-

pond the Mortgage money and Intereſt, unleſs it were for valuable Conſiderations to one who had no notice of her Title; but the Defendant is no Purchaſor, but comes in only as Executor, and paid no Money for the Leaſe: Therefore prayed that ſhe might be admitted to redeem from the Mortgagee, that the Profits and Rents which the Defendant had received ultra the Intereſt might be accounted to her as belonging to her for her Jointure.

The Lord Chancellor after much debate decreed, That ſhe ſhould have the Redemption, paying a third part of the Principal-money, but ſhould have no Profits received by the Defendant, till the Bill exhibited 1681. which was the firſt time he had notice of the Agreement. And the Plaintiff was to pay the other two parts of the Principal, and the Executrix the Wife to be re-imburſed in caſe ſhe died, if ſhe paid more than the third part. The Mortgagee was Party to the Bill.

Hammond *contra* Shelly.

Commiſſion to examine Contempt ſworn, viz. Proceſs ſerved.

THE Defendant was decreed to pay the Plaintiff 400 l. and being examined for Non-payment, denied the Service of the Proceſs; and the Parties living in Plimouth, the Plaintiff had a Commiſſion to prove the Contempt, and proved it poſitively by one Witneſs. The Defendant prayed a Commiſſion to examine touching the Contempt, alledging to the Court that the truth was, That the Defendant was never ſerved, but ſick in her Bed at the time when the Service was pretended to be made; and that her Siſter going to the Door when he that ſerved the Proceſs knocked, he ſerved her inſtead of the Defendant.

The Plaintiff much oppoſed this Commiſſion, but my Lord Chancellor granted the Motion, for it was not known whether it was ſerved, but whether it was miſ-ſerved; and ſaid it was no reaſon ſhe ſhould loſe her liberty upon a Miſtake of ſerving Proceſs.

Paget

Paget *contra* Paget, &c.

THomas Lord Paget deceaſed, having ſeveral Sons, whereof the Plaintiff was one, he by good aſſurance appointed inter alia, 12000 l. to be for Portions of the younger Sons, the Plaintiffs Proportion thereof came to 2000 l. or thereabout; but he became indebted and had ſpent 400 l. which he deſired one of the Defendants, the now Lord Paget, to pay him out of his Portion, which was in the Defendants hands, and to relieve him he was contented to do, ſo as out of the reſt Proviſion might be made for his Wife and Children, to be laid out in Lands; for it was feared that he might waſte the reſt: And Articles were entered into accordingly that the reſt ſhould be ſo laid out; but the Plaintiff being further indebted, he ſues to have ſome further Proportion; for he might better provide for himſelf and Family if he might be ſupplied with 500 l. to buy an Office, and 100 l. to pay his Debts.

The Lord Paget ſubmitted to the Judgment of the Court, and was willing to pay the Money into Court, or as the Court ſhould order.

The Lord Chancellor propounded often to the Defendants Counſel, what Sum ſhould be paid. Chancery. Feme Covert examined. Conſent, &c.

They ſaid they might not conſent: The Articles were that it muſt be laid out in Land; and the Wife was concerned, and no party to the Bill. The Wife happened to be in Court, and ſaid ſhe deſired the Money might be laid out as her Husband had prayed; and being examined by the Lord Chancellor, anſwered accordingly.

Whereupon the Lord Chancellor decreed that 600 l. ſhould be paid, viz. 100 l. to pay debts, and 500 l. to be laid out to buy an Office, but not to be paid to the Plaintiff himſelf, but for an Office; and in the mean time the Lord Paget to pay the Intereſt, for he did offer to pay the whole into Court, or keep it at Intereſt. And it was further ordered that the Plaintiff ſhould procure the Office within Months.

Quære, If the Office be bought, and the Husband die; quid.

Mildmay

Mildmay *contra* Mildmay, &c.

Conveyance in truſt by the Husband for his Wife. Baron and Feme. Agreement. Elopement.

THE Plaintiff, Wife to the Defendant, and Coward her Truſtee, ſue to have perfoꝛmance of an Agreement made under hand and Seal; by which the Defendant granted to Coward, whoſe Executoꝛ the Plaintiff Coward is, all his Rents of his Manoꝛ of Eaſt-Camel in the County of Somerſet, Habendum foꝛ years, if the Wife lived ſo long, foꝛ the ſole uſe of the Wife; and if the Rents failed by the death of Tenants, whereby the Lands might decay, he would continue payment, and enfoꝛced her demand, becauſe the Eccleſiaſtical Court had given her Alimony, but leſs than they would have otherwiſe given her in reſpect of this Gꝛant; and foꝛ further Equity, that the Defendant had bought in ſome of the Tenants Eſtates, whereby the Rents could not be recovered at Law.

The Objections were:

1ſt. That the Gꝛant was after Marriage, and voluntary; foꝛ her Poꝛtion being 1200 l. ſhe had on Marriage a Jointure of 100 l. per Annum ſettled; and the Gꝛant in queſtion was made two years after, and the Rent was duly paid till ſhe undutifully eloped from him, as he depoſes in his Anſwer.

2dly. The Caſe of it ſelf is not a Caſe foꝛ this Court to favour; and to decree foꝛ the Wife againſt the Husband, is to give her power over her Husband, oꝛ his Eſtate, by a voluntary Agreement of the Husband.

The Loꝛd Chancellor decreed that the Plaintiff ſhall not be barred to ſue in her Truſtee's name: And that the Surrender oꝛ Diſcharge of the Rent by the Husband, ſhall not be made uſe of.

White

White *contra* Small.

DEcree that Conveyances made to the Defendant by Elizabeth Marchant of an Equity of Redemption, be ſet aſide; the Bill being grounded on Weakneſs and Lunacy of Elizabeth, the Plaintiffs Couſin-german, and Heir to Elizabeth; the Defendant Couſin-german, in the ſame degree. No proof of Lunacy; but ſhe was weak of Underſtanding, ſhe could read, and taught a Child to read: Two days after the Deed, ſhe ſaid ſhe had made it to the end the Defendant ſhould have the Land; yet becauſe the former Communication of ſuch Grant was before, and no conſideration in the Deed, but Fraud——to be prepared and obtruded on Elizabeth. It was ſet aſide by the Lord Chancellor.

Conveyance voluntary made by a Perſon weak, tho' not Lunatick, avoided.

DE
Term. Sanct. Trin.
Anno Regis 34 Car. II.
In
CANCELLARIA.

Domina Dacres *contra* Chall. Chute. 15 June 1682.

Jointure. Sequestration.

CHall. Chute, Grandfather to the Defendant, and Husband to the Plaintiff, by Deed covenanted to settle on the Plaintiff a Jointure of 500 l. per Annum, or leave her 5000 l. He failed to make the Jointure, and died: The Plaintiff obtained formerly a Decree for the 5000 l. with damages, against Chall. Chute, Father of the Defendant, who dying, the Bill was revived against the Defendant as Heir to his Father and Grandfather, and against Mr. Barker and Mr. Leonard, his Uncles and Guardians. There was so far proceedings against Chall. Chute the Father, that a Sequestration of the Vine and other Lands was ordered, and Owen and three other Sequestrators were named. The Cause coming to be heard against the Defendants, the Bill being for the 5000 l. damages:

The Councel for Chall. Chute then Defendant, informed the Court that there were many debts on the Estate; and two younger Sons and a Daughter of the Defendant's Father, that had no maintenance, a Statute of 3000 l. to the Lady Anglesey, acknowledged by the Defendant's Father for payment of 400 l. per Annum, to the Lady Anglesey for her life; and if the Lady Anglesey should lay hold on the personal Estate, the Family would be ruined, the younger Children unprovided for, the debts insuperable,

ble, and therefore the Defendant's Councel propounded for remedy that the Plaintiff the Lady Dacres should not lay on the Sequestration on the whole Lands, but suffer the Lady Anglesey to enjoy part; for though her Statute bound the Defendant, (being acknowledged by him) yet it was subsequent to the Plaintiffs demand, grounded on the Grandfather's Covenant, and some other things, and propounded that 40 l. apiece might be paid for the young Children; and after debts paid, and these things done, the Defendant should have the Surplus. Mr. Baker and Leonard, the Guardians of the Defendant, and the Plaintiff not opposing, it is so decreed, and Mr. Owen (which was part of the Proposal) to receive and dispose of all, and 20 l. per Annum Salary to be allowed to him, and accordingly the Court decreed it. The Childrens Maintenance was raised and disposed of by Owen, as well as the other Matters and Payments to the Plaintiff, towards her Satisfaction of her 5000 l. with damages: Owen to take Administration of the personal Estate, and apply the same to the other debts, which he did: And the Maintenances of the three young Children, amounting to 120 l. per Annum, was by Owen paid, some part to the Childrens own hands, and the rest to the Plaintiff for them, who educated them therewith, paid for their Schooling, Cloathing, &c. and brought them up very well; and Owen accounted still to Mr. Barker of those and the other payments. Mr. Barker subscribed and allowed the Accounts, and so Matters continued and were transacted for many years, viz. about twelve years.

And then Chall. Chute the Grandchild appealed to the Lords in Parliament against the Decree; and among other points, insisted that he ought not to have been charged with the Maintenance of 40 l. per Annum, to his younger Brothers and Sisters. And as to that point the Lords in Parliament adjudged, that the Clause in the said Decree touching the Maintenance of the young Children, be reversed and annulled; inter alia, they confirm the first Decree made for the Lady's 5000 l. with damages. They order, &c. that the Plaintiff account for what hath been received by her.

Afterwards the Plaintiff exhibits this Bill, for that Chall. Chute the Father had made a Will, which was in Mr. Barker's hand and concealed; wherein he made Barker and Leonard the Uncles, Guardians to all his Chil-

dren, and his Executors; and as she alledged, he had provided for Maintenance for the younger Children thereby, and therefore she ought not to be charged with the Maintenances; for the Defendant pretended that the Monies received by her from Owen out of his Estate, ought to be charged on her account, and to sink her principal debt, with proportionable damages from time to time: And on this depended the Resolution of an Exception to the Master's Report, who stated the Account as to this matter, especially touching that point.

Now the Will was read as before, but tho' the Uncles were made thereby Guardians and Executors, nothing could be thence enforc'd to the point of the Maintenances.

The point debated before the Lord Chancellor was, Whether the Plaintiff should be charged with the Money received by her from Owen for the Childrens Maintenance, amounting to 1200 l. which with Interest came to 2000 l. or thereabouts?

The Defendant's Council now insisted that she should;

1st. For she was their Grandmother, (which was true, for Chall. Chute their Father married her Daughter their Mother) and therefore she by Law ought to have maintained them.

2dly. It was her Agent that received the Monies, and paid the same to her.

3dly. The Lords Order is express, that she is to account for what she received; but this Maintenance-money was received by her.

The Plaintiffs Council answered;

1st. She is not bound to maintain her Grandchildren more than the Defendant is to maintain his Brothers, and no Law binds her to it.

2dly. Owen is not her Agent, but the Agent of the Court, and of the Creditors, and of the Plaintiff: He is appointed Receiver for all Persons, and that by the Court, and this done at the Proposal of the Defendant for his benefit, and to preserve him and his Family; for the Plaintiff suffered prejudice by it, viz. delay in payment of her 5000 l. for Satisfaction whereof she had a Sequestration. And,

3dly.

3dly. The Order of the Lords, that she should account for what she received, must be intended of so much as she received to her own use, but not of what was paid to her only for the Children.

Owen received for the Children, and paid it all for them, and much into their own hands, and it is not more just to charge the Lady than Owen with it: And the Receipt and Employment of the Money was by virtue of, and in obedience to a Decree of the Court while it was in force, which Decree was at the Defendant's motion by his Councel, and for his advantage, not the Plaintiffs; and after the Decree the Plaintiff nor Owen could not avoid obedience to it, and no Man must suffer for his obedience; and if the Court erred in this, they ought to make restitution who received the benefit of that Error, viz. either the younger Children who enjoyed it, or the Defendant, whose Councel moved it, and procured it for the benefit of the Defendant, and his Uncle and Guardians were Parties to the Suit, and were present in Court, and consented to the Decree as much as the Plaintiffs, viz. she nor they did not oppose it. And more; for it cannot be conceived that the Infant Children made the Proposition to the Court, but rather Barker and Leonard, Guardians; and if it had been for the disadvantage of the Defendant, to whom they were Guardians, their duty was to have opposed it: And when an erroneous Decree is made in behalf of any one, and an Agent appointed to manage it for such Person, and it be done, when such Decree comes to be reverst, Restitution must be from that Person for whose benefit the Decree was, and not from the Agent.

The Lord Chancellor in the debate seemed very inclinable to relieve the Lady; for he declared that the Lady as Grandmother was not bound to maintain the Grandchildren, but as Justice should order, &c. frequently prest the Defendant whether he would not at least do something for his Brothers, &c. Declared at last he saw no Equity nor Ground to charge the Lady, &c. and the Decree while unreverst, was to be obeyed: And as this Case was circumstanced, the Court when a Family is to be preserved, younger Children kept from being starved and undone, and care taken by consent of the Persons and Friends in it, and an Estate able to bear it, if this should be undone;

All such Cares and Providence of the Court would be lost, and those already made, reverst, which would be inconvenient: But he said I am to obey the Order which limits me; and so as to this part relieved not the Plaintiff.

Dyer *contra* Dyer. 17 June 1682.

Purchaser. Incouragement by one who had Title. Ignorance. *Postea*, *Hobbs* contra *Norton*.

THE Defendant's Father granted to J. D. a Rent-charge of 100 l. out of certain Lands mentioned in the Bill under power of Revocation. The Plaintiff treated with J. D. to purchase the Rent, which the Defendant for Twelve years continually paid to J. D. The Plaintiff informed the Defendant that he was in treaty to purchase the Rent, and enquired of the Defendant whether such Grant was made, and whether it had been so paid, and whether it were revoked or not, and the Bill chargeth it so: And that the Defendant confesseth the Grant and Payment, and that it was not revoked to his knowledge. Thereupon the Plaintiff purchased the Annuity for 2000 l. All this the Defendant in his Answer confessed: But whereas the Plaintiff in his Bill charged also that the Defendant promised payment, he denieth any promise. The Cause was brought to hearing on Bill and Answer.

And Mr. Solicitor, the Plaintiffs Councel, prest for a Decree.

The Attorney General moved that the Cause might be put off till a Cross Cause might be brought in, which would be ready, &c. Which Cause was to discover Settlements made by the Grandfather on Marriage, by which the Defendant's Father could not make such Grant: Which Settlements were concealed, and kept from the Defendant.

Mr. Solicitor. Be your Title what it will, it will not hurt the Plaintiff, who acquainted you with his intent to purchase, and you confess payment, &c. so you have thereby encouraged and drawn us into the Purchase, and we have paid fully for it.

Ignorance of a Man's Title shall not prejudice it.

Attorney-General. We told you nothing but the truth, and were ignorant then of our own Title; our Ignorance must not prejudice us; if we had misinformed you, or having a Title and knowing it, concealed it, that might alter the Case.

Lord

Lord Chancellor. Ignorance of his Title differs the Case, therefore put off the Hearing, &c.

Booth *contra* Booth.

THE Uncle by Lease and Release settled the Lands in question to the use of himself for life, Remainder to Humphrey the Plaintiff, Remainder to his Sons, first, second, third, and fourth in tail; the Remainder to the Defendant for Life, Remainder to his first, second, &c. Sons, with power of Revocation, and a Proviso if Humphrey marry without consent of the Uncle during his life, and after his death, of A. B. &c. then the Uses limited to Humphrey and his Sons to cease, and then to the use of the Defendant. He married without consent, having no notice of the Conveyance or Proviso: But his Uncle (who knew not of the Marriage) entertained him kindly, and gave Legacies to him by his Will, and died. The Defendant disturbs the Plaintiff because of the Forfeiture, and dismist to Law.

Forfeiture. Notice. Trust and Estate, their difference.

But the Chancellor ask'd if it were a Limitation of a Trust, or of an Use?

Resp. Use. Chancellor, Then it is at Law.

Anonymus. 3 July.

BY a Decree in Chancery a Will of Lands attested by three Witnesses, who at several times subscribed their Names at the request of the Testator, but were not present at once together, is a good Will within the Statute.

Will attested by three Witnesses, tho' at several times, good. *Vid.* Stat. 29. Car. 2.

Anonymus. *The same Day.*

A Man devised his Debts to be paid out of his real and personal Estate; the Executor paid more than his personal Estate, he shall be reimbursed out of the real Estate.

Debts devised to be paid out of real and personal Estate.

Herring

Herring *contra* Walround. *The same Day.*

A Monster shown for Money, Misdemeanor.

HErring, Anno 1681. was delivered of two Female Children, they were baptized by the names of Aquila and Priscilla: The Birth was Monstrous, for they had two Heads, four Arms, four Legs, and but one Belly where their two Bodies were conjoined. The Birth was at Ilbremers in the County of Somerset: Many People came daily to see them, and gave Money to the Parents; the Father was a poor Cottage Tenant to Mr. Walround, a Justice of the Peace, who, and the Father entred into Articles that Walround should have the custody of the Children, and the benefit that was to be made by showing of them; but was to pay the Plaintiff One eigth part of that benefit, and to maintain the Plaintiff his Wife and Children (for he had other Children) so long as Aquila and Priscilla lived. The Bill complains that the Articles were gotten from the Plaintiff by surprize, being prepared, &c. but the contrary was proved: The Children lived but a month, and then after the Bill being exhibited to be relieved against the Bond and Articles, and an Account of the Monies received by the Defendant for showing the Children, which the Defendant had imbalmed, and caused to be still kept.

20*l.* Bonds mutually to perform Articles.

The Chancellor much disliked the Plaintiffs doings, Decreed the Defendant to bury the Children within a week, and to account for what he or his Agents had received, and full Costs of the whole Suit to the Plaintiff; who (her Husband the Plaintiff being dead) did revive the Bill.

Collett *contra* Collett. *The same Day.*

WIlliam Fox Gent. having Issue three Daughters; Mary Goodwin Widow, Elizabeth late Wife of Samuel Collett, and Martha late Wife of Cornelius Collett, by his last Will dated the 27th of September 1679. among other things, deviseth as followeth.

And

And as to the Reſidue and Overplus of his perſonal Eſtate, concludes his Will in theſe Words:

Reſiduum to be laid out in Purchaſes, &c.

I will that after my Debts which I ſhall owe at the time of my deceaſe, and my Funeral Expences, and the Probate of this my Will be diſcharged and paid; then I do give all the reſt of my perſonal Eſtate unbequeathed, to purchaſe an Eſtate near of as good value as the ſame perſonal Eſtate ſhall amount unto, within one Year next after my Deceaſe: Which ſaid Eſtate ſo to be purchaſed, I will, ſhall be ſettled and aſſured unto, and upon my ſaid three Daughters, Mary, Elizabeth and Martha, and the Heirs of their reſpective Bodies lawfully begotten, for ever; or otherwiſe my ſaid Daughter Mary, and the Husbands of my ſaid two other Daughters Elizabeth and Martha, ſhall for ſuch Monies as they ſhall receive of my ſaid Executors, for the Overplus of my perſonal Eſtate, to enter into one or more Bonds, of the double Sum of Money as each part ſhall amount unto, the ſame being to be divided into three Parts, unto my ſaid Executors within Eighteen Months next after my Deceaſe, to ſettle and aſſure ſuch Part or Sum of Monies as each of them ſhall receive; and by this my Will for the Overplus of my perſonal Eſtate, unto and upon the Child and Children of my ſaid three Daughters, Mary, Elizabeth and Martha, part and part alike.

Martha the Wife of Cornelius Collett died about half a Year after the Teſtator her Father, leaving Iſſue a Daughter, which Daughter died about four Months after the Mother: The other two Siſters, viz. Mary and Elizabeth ſurviving, Cornelius Collett took Letters of Adminiſtration as well of the ſaid Martha his Wife, as to his ſaid Daughter.

No Land or Eſtate was purchaſed with the 400 l. or the Overplus of the perſonal Eſtate given to Martha.

The Queſtion was, Whether the Plaintiff who was Adminiſtrator both to his Wife and Child, was intituled to the third, or any part of the Reſidue of Mary's Eſtate?

The Lord Chancellor diſmiſt the Bill, and declared he had no part therein, not in Right of his Wife, becauſe ſhe died; and by the firſt part of the Clauſe it was to be laid out in Land, to be ſettled on the three Daughters, and the Heirs of their three Bodies: And by the ſecond Clauſe Mary and the Husbands of Elizabeth and Martha, are to ſecure what they receive, &c. pro ut.

Nota,

Nota, In the last Case it was moved, that if Land had been purchased and settled to the Wife in tail, the Plaintiff should have been Tenant by the Courtesy, and therefore should have recompence; sed non allocatur.

Clayton *contra* Duke of *Newcastle*. July 1682.

The Heir sells in the Life of the Ancestor, and receives the Money. The Ancestor dieth, the Heir is decreed to convey.

THE Earl of Newcastle purchased Clipston in the County of Nottingham, to him and to Sir Charles Cavendish in Fee, in trust for himself and his Heirs; the rest of his Manors and Lands by Recoveries and Deeds, he settled in Trustees for himself for life, and to pay debts and raise Portions after his death: And the Wars falling out, he went beyond Sea, in which time, viz. of his abode there, the Lord Mansfield his Heir apparent, and Henry his Son, and now Duke acted on the Earl's behalf, sold Clipston to Wakefield in Fee for a full consideration, in trust for William Clayton: The Conveyance was made by the Lord Mansfield and Henry his Son, now Duke, and by Rolleston, who was then the surviving Trustee in the great Settlement aforesaid, but was not estated in Clipston, for that was not comprized in that Settlement; but the legal Estate was in the Earl and Sir Charles Cavendish, and the Purchase-money was duly paid to the Vendors, and part paid by them for a Daughter's Portion.

Wakefield and William Clayton, for whom J. S. was Trustee, on Treaty of a Marriage to be had, and Portion, covenants to settle Clipston, inter alia, on the Plaintiff himself, with Remainder, &c. to the first, second, &c. Sons in tail, &c. and a Settlement (tiel quel) made accordingly, and Possession accordingly, enjoyed till 1660. when the Earl returned into England, and entred on the Estate, and divers Suits arise between the Earl and Clayton; they both die, the Lord Mansfield dieth, the now Duke Heir to them both being in possession: Clayton, Wife of William, sueth to be relieved for Clipston, being made to her in Jointure, but opposed by the now Duke, on two grounds.

1st.

1ſt. By certain Articles made between the Earl and Clayton, whereby Clayton was to convey Clipſton, &c. inter alia, to the Earl; but as to them the Court in a Cauſe lately heard between the now Duke, then Plaintiff, &c. to have the Articles performed, and 6000 l. paid according to thoſe Articles; had ſet them aſide, becauſe they were waved, and new Agreements made, and other Reaſons, and the Duke's Bill diſmiſt.

2dly. Becauſe the Perſons who contracted with, and conveyed to Wakefield, had no Eſtate in them, nor were truſted by the Earl to ſell; but the Eſtate in Fee of Clipſton was in the Earl himſelf, and Sir Charles Cavendiſh in Truſt, for the Earl; and Sir Charles Cavendiſh died, and the Earl ſurviving, the whole legal Eſtate did veſt in the Earl, and is come by deſcent to the now Duke as heir to the Lord Mansfield; and the Earl and he had the legal Eſtate in Law, and Equity alſo; whereas Mrs. Clayton the Plaintiff had only Equity with her, (if ſo much.) And then where Law and Equity is, it will prevail againſt Equity without Law.

And the Defendants deny that the Earl ever gave any Authority for the ſale of Clipſton, or knew of the ſale, or imployment of that Money; but that during his Exile, he was maintained by his Brother, and that the Earl by his Entry was eſtated in his firſt right, and no way bound by what was done of others.

E contra, That the now Duke having taken upon him to convey, and conveyed the Lands by Indenture under his hand and Seal, as alſo the Lord Mansfield did; and receiving the Purchaſe-money, and employed it for the benefit of the Family, and having now no Title, but as heir now that he is come to be Owner of the Lands he ſold, he ſhall be bound to make good the Sale, and accordingly the Lord Chancellor decreed it.

In the hearing of the Cauſe, offer was made to read Proofs, to ſupport the Articles, becauſe there was no decree in the other Cauſe, but only a diſmiſſion; but the Lord Chancellor did not admit it.

Bullock *contra* Knight. 14 July.

The Caſe was.

Term not ſealed.
Truſt to *A.* for *A.* the life of *A.* ſo long as Iſſue continu'd.
A. ſells the term, it is good.

William Bullock being poſſeſt of a Leaſe for a thouſand Years, of the Lands in queſtion, in conſideration of a Marriage to be had between Henry Bullock, his eldeſt Son, and Bridget, Daughter of Sir John Knight, granted the ſame Term to Sir John Knight, &c. in truſt, that William Bullock ſhould receive the Profits till the Marriage, and after the Marriage to permit Henry Bullock the Son, and his Aſſigns, to hold the Premiſſes, and receive the Profits ſo long of the ſaid Term as he ſhould live, and no longer; and after his Deceaſe and Marriage, ſhould permit the ſaid Bridget and her Aſſigns, to hold and enjoy the Premiſſes, and receive the Profits ſo long of the ſaid Term as ſhe ſhould live, and no longer; and after the ſaid Marriage, and Deceaſe of the Survivor the ſaid Henry and Bridget, ſhould permit the Premiſſes to be enjoyed as followeth, but not otherwiſe, or in any other manner: viz. By the Iſſues of the Bodies of the ſaid Henry and Bridget, between them to be begotten, for and during ſo long time of the ſaid Term as ſuch Iſſue ſhould have a Being, and continue in rerum natura, to take and enjoy in like manner as Heirs in ſpecial tail by courſe of deſcent to hold and enjoy; and for default of ſuch Iſſue, ſhould permit the ſaid Henry, his Executors, &c. to enjoy the Premiſſes, and receive the Profits to the end of the term. Henry and Bridget had Iſſue, Henry and John, who died both without Iſſue in the life of Henry the Father. Henry the Father aſſigns to William all his Intereſt which belonged to him, to William Bullock, Habendum after the Death of himſelf, and of Bridget, and of the Children of Henry and Bridget, and dies: Bridget ſurvives him; Sir John Knight takes Adminiſtration to Henry, the Son of Henry, Bridget takes Adminiſtration to John the Son of Henry; Sir John Knight aſſigns to Bridget, Bridget aſſigns to Ann the Defendant; upon whoſe Plea and the Bill, all this matter appears: John Bullock the Plaintiff claims by the ſaid Deed of William Bullock, and his Executors.

The

The Lord Chancellor took time to advise, and now, the 14th of July 1682. heard Councel again, and declared that the Limitation to the Issue, ut supra, vested the Estate in Henry and Bridget, and not in the Issue: And Ann had a good Title, and allowed the Plea.

Culpepper *contra* Aston: *Et e contra.*

SIR Thomas Culpepper, Father of the Plaintiff, seised in Fee of Lands in Plumpsted, &c. by his last will in writing devised, (viz.) I give to my Daughter Ruperta 1000 l. to be paid at her Age of 18 Years or Marriage, and to be levyed out of all those Sums of Money due from his Majesty for the Wardships of Phillips, &c. and the Residue thereof to my Son Thomas, and that for payment of his Debts, his Lands in Plumpsted, &c. shall be sold by my Executors; and my meaning is, that if all my Debts, and the said 1000 l. may be raised as aforesaid, or out of the Rents and Profits of my Lands, Tenements and Hereditaments, then my Lands in Plumpsted, &c. shall be convey'd to my Son Thomas and his Heirs. And three or four Days after, the 9th of March 1642. by Lease and Release, conveys the Lands in Plumpsted, &c. to Sir Nicholas Crispe and Henry Culpepper, to pay his Debts: Sir Thomas Culpepper died: Thomas the Plaintiff being his Heir, exhibits a Bill to be relieved and to have the Land, supposing there was sufficient to pay all, without sale of Plumpsted, &c. Cross Bills were exhibited.

1st. The Lord Chancellor declared, that when Lands are appointed or conveyed to pay Debts, the Heir is intituled to have the Lands after the Debts paid.

2dly. A Purchaser buying the Lands is not concerned whether there be Sufficiency or not; but if he buy and pay, though there were sufficiency to pay the Debts out of the personal Estate, that yet he should hold the Lands against the Heir, and the Heir must take his Remedy against the Trustee; and so if the Matters rest in account between the Heir and Trustee, his Purchase is safe tho' the Money be mispended by the Trustee.

1. Purchaser of Lands appointed to pay Debts, is safe tho' there be sufficient to pay of the personal Estate.

2. But otherwise if the Purchase be *lite pendente*, by the Heir against the Executor.

Lis pendens. Notice in Law.

But Lis pendens, between the Heir and Truſtee to have an account, is ſufficient Notice in Law without actual Notice of the Suit, ſo that if he purchaſe, it is at his Peril: So that if in the event of that Suit, it falls out that the Debts were paid when he purchaſed, or ſufficient of the perſonal Eſtate to pay his Debts without ſale, the Heir will recover againſt the Purchaſer; but if it fall out there was a neceſſity to ſell them, then the Purchaſer is ſafe.

But ſuch dependance of Suit muſt be real, and not colluſive.

Nota, In this Caſe the Bill was filed the 18th of June 1661. but no Proceſs ſerved on Aſton till November 1661. And Sir Robert Aſton's Covenant was in July 1661. mean between the Bill and Proceſs ſerved; but at Common Law if an Executor be ſued, and after an Original pay a Debt of the ſame nature without Notice of the Original, he is excuſed. But it ſeems to me the Caſes differ, for an Executor is a Perſon known to whom the Plaintiffs may give Notice, but the Purchaſer is individuum vagum; any Man may purchaſe, and the Heir cannot know to whom to give Notice.

The Queſtion that was here, was, Whether the Legacy of Ruperta, the 1000 l. were liable on the Land or no? And true it is, that originally it is not, and there was divers Queſtions aroſe upon that.

Firſt, Whether the Will were revoked by the Deed?

The Opinion of the Chancellor was, that it was revoked by the Conveyance; and that was not much oppoſed.

Legacy to be paid out of the King's Debt, that Debt fails.

Secondly, It was objected, that the Legacy of the 1000 l. was given out of the King's Debt, which failing, the Legacy failed: And if ſo, it was agreed the Legacy failed.

But it was anſwered, that the Gift of the Legacy was abſolute in the firſt Clauſe, the raiſing it out of the Debt, and the following Clauſe, but a Direction how to come by it the ſooner; but then it was objected, that the Will charges only the perſonal Eſtate with the Legacy; for as to the Land, tho' the Will at firſt charged the Land with the

the Legacy, yet the Will being revoked, the perſonal Eſtate ſtands charged with it only, and not the Land.

Reſp. It is true, the Land does not ſtand charged with the Legacy originally, but there was enough of the perſonal Eſtate to pay the Legacy if it had been ſo employed; and therefore when that perſonal Eſtate is employed for payment of Debts in caſe of the Heir and Lands, ſo much of the real Eſtate as is eaſed by the perſonal Eſtate, ſhall be liable to the Legacy.

Heir eaſed out of the perſonal Eſtate. Legatee, recompence from the Heir, &c.

The Lord Chancellor decreed accordingly, and a Maſter to take the Account.

Anaud *contra* Haniwood. 1682.

BEnjamin Haniwood, Citizen, &c. of London, had Iſſue the Plaintiffs Wife Sarah, and the Defendant his Son, and by Articles covenanted to advance and ſecure to his Son 4000 l. to be laid out in Lands, which were to be ſettled on his ſaid Son for 99 Years if he lived ſo long, the Remainder to his Wife, whom he was to marry, for her life; the Remainder to his firſt, ſecond, &c. and other Sons in tail, Remainder to the Heirs of his Son, and gave 800 l. to his Daughter in Marriage, and after made a Will in writing, ſubſcribed by him, wherein he declared his Daughter not fully advanced; and by another latter Will declared that ſhe was fully advanced, and the former Will being revoked, died; but the 4000 l. was paid, and the Land bought and ſettled: He left other perſonal Eſtate of 2000 l.

Marriage. Cuſtom of *London*.

The Daughter ſued in Chancery, and the Queſtions were two:

Firſt, If the Daughter were full advanced according to the Cuſtom or no? viz. if the Declaration of the Father by Will ſubſcribed, and after revoked, were ſufficient to declare her not fully advanced; for ſuch Declaration by Will is of no effect, becauſe the Will was become void; for determining of which, it was written to the City to certify: And 26 April 1681. it was certified from the City, that it was a ſufficient Declaration, and ſo ſhe was admitted to come in for a Child's part, bringing in the 800 l. in Hotch-pot.

The

The Cauſe proceeding to a Hearing, a Second Queſtion did ariſe, viz. If the Son ſhould ſhare in the 2000 l. without that he brought in the 4000 l. in Hotchpot; for trial whereof it was likewiſe referred to the Court of Aldermen, who made a ſpecial Report, viz. That the Caſe appeared to them to be, that the Teſtator in his life-time by Articles of Agreement ent'red into before the Defendant's Marriage, covenanted with the Defendant's wife's Father, to advance and ſecure 4000 l. in the Hands of Colvill, or ſuch others as ſhould be agreed on at Intereſt in the Defendant's name, until Lands could be purchaſed therewith to be ſettled,

To the uſe of the Defendant for life, and afterwards to his Wife for her Jointure, and then to their ſeveral Children ſucceſſively, and afterwards to the right Heirs of the Defendant.

And until ſuch purchaſe made, the Intereſt of the Money was to be to the Defendant for his life, then to his Wife for life, and afterwards to thoſe to whom the Remainder ſhould have come in caſe the Purchaſe had been made.

That the Money was payed and laid out in Lands, in purſuance of, and according to the ſaid Articles, before the Defendant's Father's death; and the Queſtion being thereupon, whether according to the Cuſtom of the City the 4000 l. ſo paid and laid out purſuant to the ſaid Articles, be an Advancement to exclude the Defendant from any ſhare of the Orphanage part of his Father's perſonal Eſtate, without bringing the 4000 l. into Hotchpot? and they certify,

That a Portion in Money given by a Freeman of London to his Son, has ever been taken for and towards the Advancement of ſuch Son out of his Father's perſonal Eſtate within the Cuſtom of the City: Alſo that Lands of Inheritance ſettled by the Father on his Son, are no Advancement of the Son within the Cuſtom to bar him of the cuſtomary part of a perſonal Eſtate.

But whether the 4000 l. advanced and paid by the Teſtator upon his Son's Marriage, purſuant to the Articles for purchaſing of Lands to be ſettled upon his Son and his Wife, and to the other Uſes therein mentioned, be by the Cuſtom of the City an Advancement of the Son, to bar him of ſuch his cuſtomary part, they cannot determine, for that they have not known, nor can find in any of the

the Records of the City any precedent of the like Case; and therefore they submit the same to the Court, and now the Cause is at hearing on that Certificate. When the Plaintiffs Councel had begun to argue, that this Money coming only out of the personal Estate of the Father, and the Father thereby lessened his personal Estate, which else would have fallen to his Children, and therefore no way like the Case, where the Father parts with his Lands to his Son, and would have proceeded to other Reasons that the Custom of the City is the Law of the Place, and not tyed to such strictness as private Customs of Wills, or Places are.

The Lord Chancellor interposed, and said that it was a clear Case, and he had known so in his time, several times, and that in this very Case: The Mayor and Aldermen were of that Opinion; and making some Reflections, as that the Certificate had not been fairly obtained, decreed against the Plaintiff, that the Defendant might share in the 2000 l. without bringing the 4000 l. into Hotch-pot.

Beckford *contra* Beckford. *The same Day.*

DEcreed that where a Citizen had several Children, and some of them are advanced and some not, the advanced Children die, the Father dieth, there shall be no Consideration had of the dead Children who were advanced, but it is all one as if they had never been.

Doyly *contra* Smith. 16 July.

A Question was, Whether a Settlement made on the Defendant's Wife on payment of 2000 l. were so made as that it was redeemable as a Security or no by those in Remainder, after an Estate tail limited to the Defendant's Wife. John in Remainder in tail exhibited a Bill, being the next in Remainder, to redeem and pay the Money; after Witnesses examined, and the Cause heard, he was dismist: But pending the Suit he levyed a Fine, to the intent to enable himself to pay and redeem, and limited the use as before, which was to the use of the Heirs Male of his Father Robert. To which he and the Plaintiff his Brother were Inheritors; the Dis-

New Bill after dismission on the same Equity by a third Person, because he could not have a Bill of Revivor.

Diſmiſſion of John was pleaded in Barr; the Plea overruled, becauſe he could not have a Bill of Review, tho' the former Bill of John was grounded on the ſame Equity 16 July, 1682. but it was ſaid that the former Diſmiſſion was on other Matters.

L. C. 1 Vern. 167. 2 Vern. 27.

Nott *contra* Hill. 20 July, 1682.

Bargain of exceſſive Value gained in time of Neceſſity ſet aſide.

SIR Thomas Nott, Father of the Plaintiff, upon ſome occaſion not very juſtifiable on his part, viz. becauſe 10000 l. which was to be laid out in Lands for his Children by Mrs. Thinn his firſt Wife, Mother of the Plaintiff: The Plaintiff did not conſent that his ſaid Father, then married to a ſecond Wife, ſhould have that Mony; the Father allowed the Plaintiff no maintenance at all, but he was put to extremity of Miſery and Want; and having an Eſtate tail in a Building at Richmond, called the Queen's Stables, of 30 or 40 l. per Annum value, a Remainder after his Father's Death with Remainders to others. Hill, Father of the Defendant, an Attorney at Law, did in the time of the Plaintiff's Neceſſity furniſh him with 30 l. and agreed to pay him 20 l. per Annum during the joint Lives of him and his Father; which Annuity was paid for five Years; he conveyed to Hill the ſaid Buildings in Fee, and the Bill now is to be relieved, and have a Reconveyance, as being a Conveyance gotten at a great undervalue and gained by Extremity, working on the Plaintiff's Neceſſity, and ſuch Conveyances and Bargains gotten from young Men in their Fathers life time, have been often relieved when they have been gained by occaſion of the Weakneſs, viz. Prodigality or Neceſſity of young Heirs in their Fathers time; and there is no difference whether ſuch Bargains be for Lands or Mony.

E contra. The Defendant's Councel objected, That here is no Art uſed to draw the Plaintiff into the Bargain; he hath no Mony lent, but the Bargain was of his own ſeeking, and was hazardous; for if the Plaintiff had died, being Tenant in Tail, the Mony had been loſt; and if the Father had lived it might have proved a hard Bargain, the Houſes are ruinous, and of but ſmall value.

Lord

Lord Chancellor. But the Case Hill had given him 30 l. to have five times so much on the Father's death, should not the Court relieve in such a Case? Here you have five times the value in Land; and decreed for the Plaintiff. He said, by the Civil Law a Bargain of double the value shall be avoided, and wish'd it were so in England.

A Bargain of the double Value by the Civil Law set aside.

Pollard *contra* Downes. 21 July 1682.

TRustee's agent are made a Letter of Attorney to J. S. to manage and receive the Rents and Profits of the Lands, who did so, and accounted to the Trustee, and now being sued by the Cestuy qui trust insisted that the Trustee, not he, was to account, and he having already accounted, he might be quiet as to the Plaintiff; But the Chancellor decreed him to account to the Plaintiff.

Double Account by the Servant of the Trustee.

Note. The Trustee was dead, but that was not yielded as the Reason.

Barebone *contra* Barnes. 22 July 1682.

BArnes possessed and interested in the Lands for sixty years, yielding 5 l. per Annum, and indebted and in danger of an Arrest, by Articles sealed assigned his Estate to the Plaintiff for 290 l. and his Tools and other Utensils on the Premisses, then employed for making of Brick. The Articles are dated 16 March, and a Proviso that if the Mony were not paid, &c. in five days, then to be void; the Articles were not performed or Mony tendred, but there being no Proviso in the Articles for the discharge of the Defendant, for the Rent in future, there arose some discourse about it: They both went to Mr. Mosier, a Councellor, about it, and he propounded that Barebone should endeavour to purchase the Inheritance, or else procure a sufficient person to take the Assignment from Barnes and secure him, or to that effect; and to that end the Matter to be respited for fourteen days. Barebone treated with the Reversioners, but they would have nothing to do with him; he notwithstanding took possession and brought in Materials, and agreed with the Labourers, but the time when, did not clearly appear, but it seemed to

be within the fourteen days after, but the fourteenth day Price a Banker came with him and brought 290 l. and Price offered himself to be Assignee, and that he would covenant for the Landlord's Rent, but no Writing was offered or prepared. Barnes took advice of Council and also of one West, which West first made the Agreement for the same with Barnes (as he said) for an able and sufficient Friend of his, but would not discover his Name till the Articles for Barebone were prepared. Barnes sells his Interest for 290 l. to the other Defendant, and the Bill is to have an assignment to the Plaintiff, because Barnes had notice. Barebone had only given 20 l. earnest, and now the Cause was heard; and the Plaintiffs Bill dismist.

DE

DE
Term. Sanct. Mich.
Anno Regis 34 Car. II.
In
CANCELLARIA.

Brent *contra* Engliſh. 13 Octob. 1682.

A. Mortgages to B. then after C. hath Judgment in Debt againſt A. and then after A. mortgageth to D. B. D. and A. accounted what was due to B. D. paid him his Mony, and B. aſſigns his Mortgage to D. C. ſues D. to pay him the Debt and to have an account of what was really due to A. and himſelf. D. pleads the former Account. Mortgage and double Account.

1ſt. Lord Chancellor declared that C. was to be admitted to redeem paying what was due.

2dly. But it was debated and inſiſted on by the Counſel of D. that the Account ſhould conclude C. though no Party thereto.

Lord Chancellor remembred Cox and Shearman's Caſe pro Quer.

Reſp. There the Account was litigated, here it is voluntary.

Lord Chancellor. Anſwer the Bill.

Haycock *contra* Haycock. *Eodem die.*

Double Account Party.

THE Teſtator deviſed 600 l. to A. 700 l. to B. 700 l. to C. The Executor waſted the Eſtate, B. ſueth her Executor, who pleads in Abatement of the Legacy to C. and that the Teſtator by the Will did alſo appoint that if his Eſtate fell ſhort to pay them, then each Legatee ſhould proportionably abate, which is no more than what the Law is in ſuch Caſe. And if his Eſtate did increaſe and improve then each Legacy to be proportionably encreaſed, and therefore C. ought to have been Party to the Bill, for the Account made with the Plaintiff will not conclude C. and ſo he ſhould be put to two accounts and double Proof and Charge.

Solicitor pro Quer. In caſe a Legacy had been given to two, one could not ſue; or if Reſiduum bonorum be given to divers, they muſt all joyn; but when Legacies are given to divers perſons, each alone may ſue for his own Legacy.

Chancellor. Anſwer without Coſts.

James Bovy *contra* Smith *and* Bony.

Deviſe. Eſtate.

MRS. Abeel, Mother of the Plaintiff, and to whom he is Heir at Law, had four Daughters, Siſters to the Plaintiff. Mrs. Abeel ſeized in Fee of Houſes in Chelſey, thoſe Houſes were by her conveyed to William Bovy and four others, to the uſe of them and their Heirs, in truſt to convey the ſame to ſuch perſon and perſons, and for ſuch Eſtate and Eſtates as ſhe ſhould appoint, and in default of ſuch appointment to the Plaintiff and four Siſters equally to be divided, and to their Heirs. She after made her Will, and thereby appointed the Truſtees to convey the Houſes to the Daughters, not mentioning for what Eſtate, and after to ſuch the eldeſt Child of the ſaid Daughters as ſhould be living at her death, and died.

The

The 1st Question was, Whether the Plaintiff, her Heir at Law, had any Title to the Trust after the death of the Daughters and Child, and it was decreed that by the Will, that Daughters and Child had but Estates for Life in the Trust, and the Fee is limited by the Will to them in default of appointment; but she having appointed another Estate to them, and what she did not appoint, viz. the Trust of the Fee-simple descended to the Plaintiff her Heir.

2dly. The Question was, Whether though the Plaintiff had once a Title, yet whether by other matters in the Case he was not barred, viz. three Fines with Proclamations, Purchase made for valuable consideration, an Arbitrement also whereto he was Party, and two Releases, viz.

William and the other Trustees did convey the Houses to the four Daughters and their Heirs; their Husbands are Parties to the Conveyance which expresseth, that it was in performance of the Trust, after several Purchases and Conveyances of the several shares were made among the Husbands and their Wives, and several Fines with Proclamations levied, and all came thereby to Box in Fee; and he and his Trustees for 1250 l. conveyed to the Defendant William Bony in Fee, who was one of the first Trustees, and many more than five Years Non-claim by the Plaintiff were elapsed before the Bill. 17 Oct. 1682. 34 Car. 2. this Cause decreed.

First, It was answered, That the Non-claim or Fines could not hurt the Plaintiffs Title, because the Fines were levied to Parties privy to the Trust, so as what Estate soever passed to them the Trust was not disturbed, for they who purchased with Notice and Privity are still liable to the Trust. Fine no bar of Trust if Notice.

Sir John Churchil insisted e contra. That if a Trustee for valuable Consideration alien by Fine with Proclamation to one who hath notice, the Alienee shall be subject to the Trust, but the Cestuy qui Trust must within the five Years sue and make Claim, or else he shall be barred, for the Alienation was a breach of Trust and Cause of Suit.

Lord

Lord Chancellor e contra. There were then no safety of any trust, if a Trustee or Mortgagee should levy a Fine to one who hath notice, if that should bar by non-claim? He therefore decreed, that notwithstanding those Fines and Non-claim, the Plaintiffs Title was untouched by them. He further declared, that a Title in Equity or a Trust, is and should be barred by Non-claim and Fine; but that must be where the Person to whom the Fine is levied, hath no notice; and in such case the Claim must be a proper way: If it be of a Trust or Title in Equity, it cannot be by Entry, but Subpœna; and if he have Title by Writ at the Common Law, and his Entry not lawful, an Entry is not good to save the Right.

Reviver of trust. 2dly. Admitting the Fine and Non-claim did bar the Plaintiffs Claim of the Trust: Yet when he that broke the Trust, comes afterwards to be Owner of the Land, tho' on good and valuable Consideration, the Trust as to him revives again, and he shall be liable to make Satisfaction, and restore the Land to the Trust, and it shall not lie in his Power to defend himself, by breach of Trust, and this is so at Common Law for Lands. A Disseisor Aliens; the Alinee dieth seised: Now the Entry of the Disseisee is barred; but if the Land come again to the Disseisor, the Entry of the Disseisee is revived. So for Goods, if a Trespasser of Goods sell them in Market overt, the Owner's Title is barred, but he may seise them if they come to the Trespasser again: So in a case of Equity, Norton against the Earl of Cunale.

Churchill. William Bony was but one of the four that broke the Trust.

Lord Chancellor decreed for the Plaintiff.

Release. 3dly. As to the Release and Arbitrament, it appeared tho' the Release was of all Actions and Demands; yet it appeared that the Arbitrament, Submission and the Release, was made on Differences only, concerning other matters, viz. the Shares of the Parties of the personal Estate of another dead Kinsman, and was for them and their Executors to the Parties and their Executors, and not Heirs.

4thly. The Plaintiff had given a distinct Release before the Purchase made, of all Actions real and Personal; yet there

there was no occaſion proved why that Releaſe ſhould be made, nor any alledged, and there were other Dealings between them: Therefore preſumed not to relate to this matter, and ſo the Decree paſſed for the Plaintiff.

Afterwards the Lord Chancellor declared at another day, that he had conferred with the Chief Juſtice of the King's-Bench, who was of the ſame Opinion.

Davies *contra* Moreton. Nov. 1682.

Forfeiture.

MOreton poſſeſſed of a Leaſe for Years, for 2000 l. aſſigned to the Plaintiff Davies, on condition not to alien without Licence. Davies without Licence mortgaged the Leaſe. Davies becomes a Bankrupt: The Commiſſioners aſſign to the Plaintiff, who exhibits his Bill to be relieved againſt the Forfeiture, and to redeem, if ſo be that the Mortgage were before the Act of Bankruptcy; for the Mortgage was pretended to be but five weeks before the Commiſſion: Moreton waves the advantage of the Forfeiture, if he may be paid the 200 l. which was the Conſideration of the Aſſignment he made; but he had on the Aſſignment taken Bond of Davies for it, and that was a Security, and determined the Contract for the 200 l. ſo he had choſen his Security, and might not thereby charge the Leaſe, or the Aſſignee thereof, if he had taken an Aſſignment. And further, he did actually come in as a Creditor for the 200 l. before the Commiſſioners, and paid Contribution.

But the Lord Chancellor would not relieve againſt the Forfeiture without payment of the 200 l.

Quære, If he would at all relieve againſt the Forfeiture, unleſs Moreton had offered it in his Anſwer, ſo as he might be paid the 200 l.

Husbands *contra* Husbands. *Eodem die.*

Lands charged by Will to finiſh Building not good.

ASeiſed in Fee, made his Will in writing, and charged his Lands and perſonal Eſtate with 400 l. to finiſh a Building which he had begun, and was unfiniſhed when he died; the Will as to the perſonal Eſtate was good, but not good as to the Land.

Hobs

Hobs *contra* Norton, &c.

The Case.

Purchaser not relieved against the Title of *A.* who encouraged him to purchase when, and when not.

THE Father of two of the Defendants, granted to the younger Brother and his Heirs, an Annuity, charged on the Land in question, with power of Revocation, and died: The younger Brother treated with Hobs to sell to him the Annuity: Hobs before his Purchase enquired of the elder Brother whether there was any Revocation made; he told him none; that he had still paid the Rent, and knew nothing to the contrary but that he must pay it, and much to that effect, and continued payment. Hobs for valuable and full consideration, purchased the Annuity of the younger Brother. The elder Brother after some time of payment to Hobs, refuseth payment of the Annuity. Hobs exhibited a Bill to be relieved, as in Amy's Case, where a Mortgagee or Conizee of a Statute was enquired of by him who was in treaty to purchase the Land, whether the Land was free of Incumbrances, and was told by him that there was none, and that he might safely purchase: Whereupon he purchases, and was relieved against the Mortgagee.

The Heir's Defence was, that he did acknowledge the Enquiry, and his Answer thereon, but then knew nothing to the contrary; but yet that ought not to prejudice him, for that since then he had discovered a Settlement made by the Grandfather, on Marriage of the Father, Grantor of the Annuity: Whereby in consideration of Marriage, and a valuable Consideration of Mony, the Lands were intailed on the Father, to which Intail he was Heir, and by consequence the Grant of the Annuity void as to him: And that this Settlement was concealed from him till of late; that his Payment and Acknowledgment was while he was ignorant of his Right, and innocently done, and ought not to oblige him: That Amy's Case differs from his; for there was a Fraud to draw on a Purchaser, in encouraging the Purchaser against his own Act and Knowledge; it was Fraud if not Malice, to do so.

There was another Point arose on the debate, but as to this the Lord Chancellor delivered no Opinion.

Aunand.

Aunand & *Ux. contra* Honiwood.

A Citizen and Freeman of London having two Children, married one of them and gave her a Portion, and after made a Will in writing, and gave her a further Sum; declaring therein that his Estate should be divided, according to the laudable Custom in Thirds, &c. which Will was subscribed by him, afterwards he made two other Wills in writing; wherein, (being also by him subscribed,) he declared that he had fully advanced the said Daughter; and in the last did upon that Reason, give her 500 l. she marrying the Plaintiff, they sue in Chancery for a Child's part, bringing into hotch-pot what she had received, and that the other Child might bring into hoth-pot what he received; the Suit was against the Executor, &c. And decreed accordingly upon the Certificate of the Recorder, Ore tenus, made the 10th of May, Anno 1681. who certified that by the Custom of London, That a Declaration made by a Citizen and Freeman, &c. with his Hand or Mark subscribed thereto, tho' such writing were made for the last Will and Testament, and the same afterwards by him revoked, is such a Declaration as will let in such a Child of such Freeman, to a Child's part. *London* Orphanage part.

And it was further decreed, that the Defendant be examined before a Master on Interrogatories; to one whereof he demurred, and set forth that he and the Testator were Joint-Partners in the Trade of a Woollen-Draper, and each brought in 1000 l. into the Stock; so they were Joint-tenants, and he was Survivor, and claimed the whole Stock, and the debts belonging to the Stock by Right of Survivorship; but the benefit of Survivorship was denied, being in Trade, tho' not Merchant-Adventurer. Surviving Tradesman.

Jones *contra* Waller. Novemb. 1682.

AN Administrator possest of a Term charged with a Trust, assigns it in trust for himself: The Administration on a Suit by Citation, (not Appeal) is revoked, and now granted to the Plaintiff: At his Suit the Assignment decreed to be set aside. Assignment of a Term by the Administrator to his own use, set aside by subsequent Administrator.

S Anonymus.

Anonymus. *The ſame Day.*

Deviation, *nauticum fœnus.*

THE Plaintiff entred into a Penal Bond of Bottomry to pay 40 s. per Month for 50 l. The Ship was to go from Holland to the Spaniſh Iſlands, and ſo to return for England: If ſhe periſhed the Plaintiff loſt his 50 l. She went accordingly to the Spaniſh Iſlands, took in Moors at Africk; and upon that Occaſion went to the Barbadoes, and then periſhed at Sea. The Plaintiff being ſued on the Bond for the Penalty, ſought relief in Chancery, pretending that the Deviation was on neceſſity.

The Bill was diſmiſt ſaving as to the Penalty.

Uvedale *contra* Ettrick. 6 Decemb. 1682.

MR. Uvedale, the Plaintiffs Husband, being ſeiſed of the Manors of Loverley and Monuton, and of the Farm of Martin, worth 600 l. per Annum, and of the Manor of Horton worth 500 l. per Annum, and indebted 10000 l. made his Will, and thereby deviſed the Premiſſes to be ſold, and deviſed 1500 l. to one Child, and 1000 l. to two others; and after his Debts and Legacies paid, the Surplus of the Land to be conveyed to his Heir: The Deviſees which were to ſell, were the Wife, who is the Plaintiff, Ettrick, Reeves, Hurſt and Conſtantine. The Teſtator died, having after his Marriage with the Plaintiff, mortgaged Horton, ſo as the Plaintiff was dowable of all the Eſtate. The Defendants to the Bill were the four Truſtees, and the Heir which was to have a Sale made, but principally that Ettrick might be put out of the Truſt. The Wife, one of the Truſtees, was drawn into Agreement to releaſe her Dower in the 600 l. a year, and to give a Bond of 4000 l. that if any of the Children died, ſhe ſhould not take Adminiſtration, except they all died; after which Ettrick turns to be the Plaintiffs Enemy, and divers matters are charged in the Bill upon Ettrick, as if he practiſed to get Horton, and to be the whole Manager himſelf. Reeves in his Anſwer prays to be excuſed in the Truſt; Conſtantine and Hurſt were not willing to join with Ettrick in the Truſt.

At

At the hearing the Plaintiff declared, being present in the Court, that though she had reason to be relieved against her Release and Bond; in regard by the Agreement she was to have her Dower set out of Horton, and the Houshold Goods in Horton-house; yet still she was contented to accept such Dower in the Third of Horton, which amounted but to 150 l. per Annum, and to join in the Sale of the rest of the Land, thereby to extinguish her Dower therein, and to leave the Goods in the House for the Heir, so that Ettrick might be discharged of the Trust: On the other side, Ettrick insisted to be continued in the Trust, and would attend a Master from time to time to get a Purchaser, and to do all reasonable Acts, &c.

The Plaintiffs Councel insisted, it being a Joint-Trust, and could not now be so executed, all refusing to join with Ettrick, therefore it belonged to the Court to order it. A Trustee removed out of the Trust.

Lord Chancellor. I like not that a Man should be ambitious of a Trust, when he can get nothing but Trouble by it; and declared that without any Reflexion on Ettrick, he should meddle no further in the Trust, &c.

DE
Term. Sanct. Hill.
Anno Regis 34 & 35 Car. II.
In
CANCELLARIA.

Tilsly *contra* Throckmorton. February 1682.

Truſtee charged on decay of the Eſtate.

A Truſt to pay ſeveral Portions to ſeveral Children at their reſpective Ages: The Truſtee pays one; the Eſtate decays, ſo that there is not ſufficient to pay the others; in that Caſe the Perſon truſted payed in his own wrong, for he ſhall make it good to the reſt, abating proportionably out of each Party's ſhare, according to the loſs; and he ſhould have taken Security in caſe of loſs happening: And ſo alſo tho' the Truſt or Legacy were to be paid to the eldeſt in the firſt place, or firſt, for that denotes not preference in the quantity.

And it was affirmed by Mr. Keck, and others at the Bar, that many times it had been ſo decreed.

But the Lord Keeper North ſeemed of another Opinion as to the laſt Point: But agreed further at the Bar, that if the Portion of any one lay on, or out of Blackacre, or other particular Fund by it ſelf, and the others out of another Fund, each muſt bear his own loſs.

Denny

Denny *contrà* Filmer. 1682.

A Decree paſſed where the Bill was never anſwered; but the Bill taken pro confeſſo, tho' the Party Defendant never anſwered, but only appeared by his Clerk, and the Bill never read in Court as it ought to have been: A Bill of Review was brought, and on Demurrer diſmiſt: Now the Heir brought another Bill of Review; and though there was manifeſt Error, not only in the form of the Court, but in the Right, viz. two Heirs having Title as Heirs, one of them Plaintiff had a Decree for the whole, who had Title but to a moiety. No new Bill after Review

Yet my Lord North diſmiſt the Bill, and ſaid there was no remedy but in Parliament, and cited Mordant or Morgan's Caſe: Where a Bill was grounded on a Deed, whereto two Witneſſes were examined; but the Deed was not produced, and the Witneſſes not agreeing, the Bill was diſmiſt, and a Bill of Review was brought and diſmiſt: And after the Deed was found, and Affidavit of it, &c. and then a Bill of Review exhibited, but diſmiſt quia of the former Bill.

Why, ſaid the Lord Keeper, was a hard Caſe.

To which it was anſwered, that it differs from the preſent Caſe; for there the Cauſe was heard on the Merits, but here is not ſo much as an Anſwer.

Lord Keeper diſmiſt the Bill.

Anonymus. February, 1682.

THE Bill was to diſcover and have Uſe of a Deed, which was to lead the Uſe of a Fine levied by the Defendant's Mother, and concealed and ſuppreſſed by her. Voluntary Conveyance no relief for Deeds againſt Heir.

The Caſe.

The Defendant's Mother ſeiſed in Fee, ſhe and her Husband levied a Fine, which by Deed was declared to be to the uſe of the Husband and Wife, with other Uſes, under which the Plaintiff makes Title, viz. by the Husband's Will, the Fee being limited to the Husband,

The

The Complaint is, that the Defendant suppresses the Deed. The Defendant is heir to her Mother, and insists that the Fine was gained unduly, and denieth the having the Deed, which was voluntary without consideration: And because the Conveyance by the Fine, &c. was voluntary and without consideration no Money being paid, &c. the Court would give no Relief, but left the Plaintiff wholly to Law to help himself there as he could.

Coventry *contra* Hall. 24 Feb. 1682.

Heir to answer mean Profits taken by him to purchase tho' the Conveyance void in Law.

Two decrees for Land, yet a new Bill for Mean Profits.

SIR Thomas Thinn had Issue Sir James by one Venter, Sir Henry Frederick by another, and made a Conveyance of several Manors on Henry, which being designed by way of Covenant to stand seized was defective, and afterward was decreed in Chancery to be relieved, and likewise settled by Act of Parliament.

Afterwards 1650. Sir Henry Thinn exhibits a new Bill against Sir James for the Mean Profits, which was decreed that Sir James should account for the Mean Profits from the Year 1646. when Sir James got the Possession. The Suit divers times abated by death, so the Decree was not completed. Sir James was dead and made Thomas, his Brother, Executor. Thomas died and made the Defendant his Executor; Sir Henry likewise died and made the Defendant his Executor.

The Cause came now to be Re-heard touching the Mean Profits between the Executors, ab integro. Two Points were debated.

1. Whether Sir James, or especially his Executors, should be accountable for the Mean Profits, for he had a Title at Law, the Conveyance being defective, and being under no Obligation of Trust or Covenant or Articles, as Heir unto his Father; and the defective Conveyance it self is not mentioned to be in consideration of Marriage, or valuable consideration, and therefore Sir James was not guilty: But Curia e contra.

2. The second and main Question was, whether a Decree being first had for the Land, and no Decree for the Mean Profits, a new Bill shall be exhibited for the Profits,

fits, especially, because in the first Bill Sir James was charged for taking the Profits, and Relief prayed on the whole matter, so that Sir Henry if he had asked it might have had Relief for the Mean Profits; and it is not denied but that he might have had a Decree, if he had prayed it.

My Lord North confirmed the former Decree made by the late Lord Nottingham for the Mean Profits, and that the Executor of Sir Thomas Thinn, Executor of Sir James, should account for them so far as the Estate of Sir James, &c.

Brown *contra* Williams. 28 Feb. 1682.

THE Assignee of a Bankrupt exhibits his Bill against the Defendant to discover Goods of the Bankrupt, that came to his hands after the Bankruptcy. The Defendant by way of Plea sets forth, that he had no Goods of the Bankrupts, or that ever were his, but what he bought for full and valuable consideration, and bona fide; and that at the time of the Sale and Payment of his Mony, he had no notice either of the Commission or of any Act of Bankruptcy committed by the Bankrupt.

Purchaser of Bankrupt without notice not bound to discover. Bankrupt.

On long debate the Plea was allowed by the Lord North, and to take what remedy they could before the Commissioners, or at Law.

Hutchins, Councel for the Defendant, cited a former President, but was not produced.

Leak *contra* Morrice. *The same Day.*

THE Bill is to have an Agreement performed by the Defendant, which was in effect, that the Defendant should assign a Term of Years in his House, and Plate, and certain Vessels of Beer for 200 Guineas, whereof he paid one in hand as Earnest of the Bargain, and three days after 19 Guineas more; and part of the Bargain was, that it should be executed by Writings by a certain time.

Stat. 29 Car. II.

The Defendant pleaded the Statute for prevention of Frauds and Perjuries, and that it was a parol Agreement, and none of the Goods delivered by the Defendant, so there ought

ought to be no relief in Law or Equity, but confeſt the receipt of the 20 Guineas, and offered to repay them.

Keck pro Def. at the Bar enforced the Plea, becauſe it was to take away the Defendant's trade, and alledged the Mony was only paid for the Leaſe.

Lord Keeper. It's clear the Defendant ought to repay the Mony; it is charged that the Agreement was to be put in Writing.

It was anſwered, Yea.

Whereupon the Lord Keeper over-ruled the Plea.

Anonymus. *The ſame Day.*

Purchaſer without Notice of Bankruptcy not chargeable in Equity to diſcover.

A Aſſignee of the Commiſſioners of Bankrupt. Portman exhibited his Bill againſt the Defendant to diſcover Lands, &c. which were the Bankrupts at the time of his breaking.

Hutchins for the Defendant pleaded that he was Purchaſer for full and valuable conſideration, and at the time of his Purchaſe, and had no notice of any Act of Bankruptcy, nor that Portman was a Bankrupt, nor of any Commiſſion, and refuſed to make diſcovery.

And the Plea was allowed by my Lord North, Lord Keeper.

Barny *contra* Beak. Feb. 1682.

Caſual Bargain for double value.

THE Bill, That the Plaintiffs Father being aged and infirm, and allowing the Plaintiff, a young Gentleman, but ſmall allowance, that he being in want one Styſted got acquainted with him, and told him that he had found out a parcel of Wines, which if he would buy he ſhould not be inforced to pay for them till after his Father's death; they went to Beak the Defendant, who ſold him ſeveral Hogſheads of Wines to the value of 1280l. and affirmed them to be of that value, and ſound, good and Merchantable; and took of the Plaintiff a Statute of 2880 l. 17 November, 1678. defeazanced to pay 1440 l. within twenty days after the death of his Father. The Wines were

were flat and dead, and were delivered to Stysted, who could sell them for no more than 360 l. that the Plaintiffs Father was but Tenant for Life, the Remainder to the Plaintiff; that this was done by contrivance between the Defendant Beak and Stysted by their Fraud, and Stysted had 20 l. of the Plaintiff, and other gratification of Beak, and the Plaintiffs Father being dead the Defendant Beak proceeded on the Statute.

The Defendant Beak by Answer, that he knew not Stysted, but he and the Plaintiff came to him to buy of him Wines, and he sold the Plaintiff twenty Tuns of Claret at 36 l. the Tun, in all 740 l. and after much treaty agreed, that if the Plaintiff died before his Father then nothing to be paid; but if he survived his Father, to pay double the value, viz. 1480 l. That the Wines were good and sound, and the Plaintiff sent Ady, a known Cooper, to tast and try the Wines, who did so; and the Plaintiff to encourage the Defendant to sell, did inform the Defendant that his Father was sickly and kept his Chamber, and denied the Fraud, and that he sold the Wines which were left, at the same price.

Trin. 1680. this Decree reversed by the Lord *Jeffreys ex relatione Servien' Hutchins.*

At a former Hearing, 9 February, 1680. the Lord Chancellor relieved the Plaintiff.

But now the Bill dismist saving as to the penalty of the Statute, for there was no proof of any Fraud, but it was a hazardous bargain.

Lord North. It may be Stysted put in other Wines, or took out of these and filled 'em again with bad.

Nota. That the same day, viz. 9 Feb. 1680. when the Lord Chancellor relieved Barny; he did not in another Case relieve though very like it, viz. between the now Plaintiff Barny and Pit. Pit lent Barny 1000 l. to have 2500 l. if Barny survived his Father, and to lose the 1000 l. if Barny died in his Father's life-time, secured by Judgment; Pit sued; Barny sought to be relieved in Equity and was dismist.

1. *Pro Quer.* *per* the Lord *North.* 2. *Pro Def. per* the Lord *North.* 3. And then reversed by the Lord Chancellor *Jeffries. Trin.* 1686.

Amand *contra* Bradburne.

Truſtees allowed ſeveral Loſſes.

TRuſtee ſued concerning the Truſt in Chancery obtained a Diſmiſſion and had Coſts paid him as in courſe, but the Coſts allowed him and tared were ſhort of his real Coſts. After a Bill by the Ceſtuy qui Truſt to have account of the Truſt, on account of his diſburſements he ſhall be allowed his true and neceſſary Coſts in the former Suit, and not be concluded, &c. and ſo ordered.

D E.

DE
Termino Paſchæ
Anno Regis 35 Car. II.
In
CANCELLARIA.

Lord Craven *contra* Widdows. 27 April, 1682.

Two Partners in Trade put in each an equal Stock, and agreed by Covenant that the Stock ſhould pay the debts of the Stock, and neither of their ſeparate debts ſhould charge the Stock, but only his own Eſtate, or to that effect; they both became Bankrupts, and a Commiſſion againſt them both, one of them owed ſeparately more than the other. Partners both Bankrupts.

The Queſtion was between ſeparate Creditors of each Bankrupt, and the Creditors on account of the Joint-Stock, for theſe would exclude the ſeparate Creditors to charge the Joint-Stock, but that it ſhould ſatisfie the Stock Debts. Creditors of the Joint-Stock, and ſeparate Creditors equal.

But the Opinion of the Lord North e contra. For the Covenant of the Partners cannot bind any of their Creditors, but only themſelves.

Quære. How the ſeparate Creditors could have other Title than thoſe under whom they claim. Proceſs.

Dicitur, That if one Defendant cannot be found to ſerve Proceſs on him, if Proceſs be againſt him till Sequeſtration, and he ſhall not appear, you proceed againſt the reſt, as when one is outlawed at Common Law.

Brown *contra* Brown. 30 April 1683.

Arbitrament

THE Plaintiff was Tenant for Life, the Remainder in Tail to his firſt, ſecond, &c. Sons, the Remainder to the Defendant in Tail. The Plaintiff having no Son committed waſte; the Defendant brought his Action for the waſte, and at the Niſi Prius by the conſent of the Parties and Rule of Court the Matter was referred to two of the Jury to make their Award by Michaelmas; on defect of an Award then to Ballard an Umpire; no Arbitrament being made, the Umpire made his Award and awarded 348 l. damages; the Plaintiff exhibited his Bill to be relieved againſt the Award, and for Equity alledged:

Firſt, Exceſſiveneſs in the Damages.

Secondly, The miſdemeanour in the Umpire, that he had declared before the Umpirage made, that he would not meddle in the matter, and after Umpirage made, declared that he made his Umpirage for fear he ſhould be arreſted, whence his Counſel inferred that he had been menaced.

Laſtly, That after the Submiſſion the Plaintiff had repaired the Premiſſes, and proved Repairs made, and that 40 s. would perfect the Repairs, and therefore prayed a new Tryal.

The Defendant inſiſted that the Umpirage ought not to be ſet aſide without fraud or partiality proved, that his ſaying he would not meddle in the buſineſs was in Auguſt before the Time he was to make his Umpirage, as the Truth was; and the Defendant had notice given him by the Umpire to attend, which he did not, ſo that the Umpire had no notice of the Reparations, and if he had, it was not material to avoid the Award.

The Lord Keeper diſmiſt the Bill.

Baily *contra* Cotton. 13 May, 1683.

BEmble ſeiſed in Fee conveyed the Lands to the Defendant for 1000 Years, in Truſt, that whereas divers Suits and Controverſies were touching the Lands; that the Defendant ſhould defend the Suits (Nota, he was Tenant of the Land then and before to the Plaintiff)

tiff) and Title with the Profits and yearly Accounts to Bemble of all the Profits, and pay to him, his Executors and Adminiſtrators the ſurplus of what he ſhould not expend, and ſhould pay an annual Sum after his death to the Plaintiff, and another annual Sum to another, and dies; the Plaintiff was his Coſin and Heir and ſued for Account and for the Lands, in regard that a Truſt reſulted to the Heir after the expreſſed Truſts were performed.

The Lord Keeper diſmiſt the Bill.

DE

DE
Term. Sanct. Trin.
Anno Regis 35 Car. II.
In
CANCELLARIA.

Foot *contra* Salway & *al'*. 6 June, 1683.

Freight. Merchant.

FOOT let to Freight to the Defendants being of the Turkey Company, 200 Tun of a Ship, wherein he was interested, for a Voyage to the Streights, the price of the freight per Tun was not expressed in the Charter-Party. The Ship brought home no Silk or other Commodities, used to be brought from Turkey; the Freight whereof of some in such Voyages was 5 l. per Tun, and of some 6 l. per Tun usually and constantly paid, but brought home only Box-wood, the Freight whereof usually was only 40 s. per Tun; the Defendants would pay but 40 s. per Tun; the Plaintiffs Bill is to have 5 l. because though it be not so expest in the Charter Party; yet it was expressly agreed, that the Ship should be loaden with Silks or other the Goods that paid the greater Freight and enforced their Equity; for that Box-wood never in such Voyages was brought home alone, but only to fill up empty places, but Cottons or other Goods, and no Man will ever let out his Ship, nor take Ship to freight for Box-wood only, for the freight at 40 s. per Tun will not pay the Charge to the Owner of the Ship; and although the Defendants pretend that they could not freight the Ship with other Goods, because the Locusts in that Year had eaten and spoiled the Cottons in those parts, yet that

that might not excuſe them from their Agreement, which the Plaintiffs Councel very earneſtly preſt to have read and proved, eſpecially Mr. Sollicitor Finch, who finding the Court againſt relieving the Plaintiff upon the parol Agreement ſaid, that moſt part of the Cauſes in Court were of that nature; yet the Court would not agree with him: But you may take remedy at Law upon your parol Agreement.

Sollicitor. No, my Lord, becauſe the Deed is the Agreement in Law.

Lord Keeper. Why, when it ſtands with and not contradicts the Deed, you may ſue at Law; and on Concluſion did not relieve the Plaintiff.

Alderman Backwell's *Caſe.* Poſt.

Bankrupt. *Superſedeas.* Commiſſion.

COmmiſſion at the Complaint of fifteen Creditors on the Statute of Bankrupts, iſſued out againſt Alderman Backwel, who died ſhortly after; theſe Creditors having Judgment, and finding that on their Judgment they might have better remedy than their proportion was likely to be on the Commiſſions: The Heir of the Bankrupt paid their Debts, and none other Creditors appearing then to proſecute, by their conſent the Commiſſion was ſuperſeded, and after thirty other Creditors ſued for a diſcharge of the Superſedeas.

Firſt, Becauſe when a Commiſſion is granted, not only the firſt proſecutors are intereſſed therein, but all that will come in within four Months; and therefore they having tendred Contribution within the four Months the Commiſſion ought not to have been ſuperſeded by conſent of the fifteen.

Secondly, They alledged that the Commiſſion had been dealt in by the Commiſſioners, and an Aſſignment of Lands made, and the Alderman being dead, they ſhould be remedileſs, for no new Commiſſion can be now granted, therefore prayed a diſcharge of the Superſedeas.

On the other ſide it was objected that the Aſſignment was void being made after Backwel's death.

The

The Lord Keeper North. If I erred in granting the Supersedeas I can discharge it. 2dly. But if some Creditors obtain a Commission and receive satisfaction, I can at their request supersede the Commission, if none other Creditors appear; I am not bound to call them in, else it were mischievous, therefore ordered the Commission to be brought in and the Assignment, if the Assignment be well, I can, &c. Try that at Law.

Davis *contra* Weld. 22 June 1683.

Necessity. Conveyance.

MArriage Settlement on the Plaintiff and Wife for life, the Remainder to Trustees for the life of Davis in Trust to preserve Contingent Remainders to the 1st, 2d, &c. Sons, &c. in Tail: They were married eleven years, had no Children, and Davis had not the Portion of 1000 l. paid, and was in debt 4000 l. by that and other occasions; the Estate settled was alledged to be 600 l. per Annum, and the Bill was against the Remainder-man for life to join in Sale of some part which also could not be done, and also the Father and Mother eaten out with the Debts, driven to great want, and Precedents cited where it had been done.

Lord North. I cannot justifie to decree a breach of Trust; if it hath been done, it was it may be when Recompence was made; and at last ordered Precedents to be lookt into.

Prideux *contra* Gibben. 23 June 1683.

Devisor not seised.

AMery on Treaty of Purchase for Lands with Pollard, Articles were made and Pollard to convey to Amery Lands called Rawson in Fee; Amery makes his Will in writing, and deviseth in general words, All his Lands to be sold for payment of his Debts and Legacies; After Rawson is conveyed to him, and he after levies a Fine, and the Lord Chancellor pronounced a Decree that the Lands were well sold, though the Devise general and the Devisor not seised at the time of the Will made, nor no new Publication of the Will being for payment of Debts; and said, that if a Man devise all his Lands for payment of Debts, and after purchase Lands, that he would decree a Sale although there be no precedent Articles.

John

John Robinſon *and* Fawknor *Plaintiffs, in a Bill of Review againſt* Nathaniel Noel, *and other Children of* Martin Noel *deceaſed, on the firſt Bill exhibited by the ſaid Children.*

The Caſe was.

That Martin Noel being ſeiſed in Fee of the Moiety of a Plantation in Barbadoes, by his Will in writing, deviſed the ſame to Robinſon and Theodore Noel, who died an Infant, and made Robinſon and Theodore and James Noel, two of his Sons, Executors, and appointed Robinſon to manage the Plantation and died; the Executors proved the Will; the Bill chargeth that Robinſon was to ſupply the ſaid Plantation during the Plaintiffs Minority, and to anſwer the Profits to them, it being for their Maintenance, and chargeth that by the Will the Plantation was deviſed to the Plaintiffs, and the ſaid Theodore ſince dead; and the Bill prayeth an account againſt Robinſon although he had aſſigned to Fawknor, and leaſed to one Warſam for Years at a certain Rent, and yet had aſſented to the Legacy; for he made a Leaſe of the ſaid half of the Plantation, reſerving the Rent to himſelf in trust for the Plaintiffs, and they pray an Aſſignment of the Term and account, Theodore and James being dead, and the Plaintiffs their Adminiſtrators. *Barbadoes.* 2 *Ventris* 358.

The Defendant Robinſon confeſſed the Seiſin of Martin Noel, the Father, and that by his Will he deviſed the ſame to him and to Theodore and to James, but denieth himſelf chargeable to the Plaintiffs. *Quere*, if in Fee.

1ſt. Becauſe by the Law and Cuſtom of Barbadoes, Plantations though in Fee are not to go to the Heir nor Legatee till Debts paid, and that the Teſtator was indebted to others and to himſelf in great Sums ultra the value of the Plantation, and mentions the Sums, and that he not being appriſed at the time of the Leaſe of ſuch Law or Cuſtom of the Barbadoes, made ſuch a Leaſe and Reſervation of the Rent, but that he made the Leaſe as Guardian and Truſtee for the Plaintiffs the Children, and not as Executor, and therefore it cannot be taken as a diſpoſition as Executor, or aſſent to a Legacy.

The Lord Keeper decreed for the Plaintiff.

DE
Term. Sanct. Mich.
Anno Regis 35 Car. II.
In
CANCELLARIA.

Lord Ranelaugh *contra* Hayes.

Covenant to ſave harmleſs decreed.

HAyes covenants to ſave the Lord Ranelaugh harmleſs touching three parts of a Farm aſſigned to Hayes by the Lord Ranelaugh, & ſue quia damnify. Decreed by the Lord North to ſave harmleſs, and a Maſter to tax Damages: But it was much oppoſed by Mr. Keck, becauſe a Covenant is not to perform any thing in ſpecie, and a Maſter in Chancery to tax Damages inſtead of a Jury, and the Plaintiff hath remedy at Law, and not here.

And Nota, the Breach aſſigned was, that the Plaintiff was ſued in the Exchequer by the King for Rent, but it was not charged in the Bill here, or proved that the Rent was behind, but only that he was ſued, &c. and objected that this would for every petty Breach ſubject the Defendant to Commitment.

Howard

Howard *Vid. contra* Harris & Robert. 6 Nov. 1683.

THE Bill was against Harris and Robert to redeem two Mortgages made to Harris by Henry Howard late Husband of the Plaintiff, and Brother of H. Heir to Harry; the Bill charges the Mortgages made, and that there was some Agreements for Redemption, if not expressed in the Deeds, yet was to be redeemed and charged that she was Jointressed on Articles made before Marriage, executed after by reason Howard, the intended Husband, was then an Infant, but at full Age made a Jointure to the Plaintiff, and offers to pay the Mony, so she may be admitted to redeem; Robert consents to her demand; Harris denies the Articles and sets forth that as to nine Tenements he was a Purchaser for valuable Consideration 1600 l. from Sir Robert Howard, and after two Mortgages made to him, the last Mortgage including the first, and redeemable on payment of 1000 l. the nine Tenements in Lease for three lives yet in being. Mortgage.

The Case came now to be heard, and on the Pleadings and Proof was, viz.

Sir Robert Howard in 1651. by Fine and Deed produced and proved, conveyed the nine Tenements in Reversion after three lives yet in being, and whereon 7 l. 10 s. was reserved to Harris and his Heirs. Anno 1665. she (Sir Robert was then dead) married Henry; 1671. Henry in consideration of 1000 l. mentioned in the Deed to be paid, conveyed Lurkin and other Lands (the nine Tenements are no part of these Lands) to the Plaintiff for her life for her Jointure (Quære if not for part of her Jointure) and after in June 1671. conveyed the nine Tenements in Reversion to him in Fee, but not to be redeemed but by Henry and the Heirs Males of his Body and by no other, which by his Answer he saith was done so, because of the injury Sir Robert had done him; for now one Berry then Husband to the Plaintiff, had set on foot a fraudulent Conveyance made by Sir Robert and his Brothers, whereby Berry pretended that Sir Robert was but Tenant for life, and so the Conveyance of the nine Tenements was void which induced Harris to consent, for thereby, viz. by this Mortgage and his Conveyance he still kept possession, and received the Rents 7 l. 10 s.

Afterwards having his Mony 564 l. secured by this Mortgage, Henry Howard had need of more Mony, and Harris supplied Henry Howard with 436 l. more, which made the debt 1000 l. and took a Mortgage Anno 1672. of the same Lands (the nine Tenements in Reversion as aforesaid) and of divers other Lands to him and his heirs redeemable only by Henry Howard, and the heirs Males of his body; but in this Conveyance (Quære, if not in the former Mortgage also) Henry Howard covenants to pay the Interest duly every half Year, and the 1000 l. in Anno 1686. Afterwards in 1673. Henry Howard conveys Hopsell and Alton, which are the nine Tenements, and divers other Lands to the Plaintiff for life for Jointure, the Remainder to himself and the heirs Males of his body, or to that effect, the Remainder over, under which Robert the other Defendant claims; but as before is said, the Plaintiff till this Conveyance had no Title to the Land in Hopsell, &c. the nine Tenements.

Mortgage redeemable by Mortgagor and Heirs Male.

For the Plaintiff, Mr. Sollicitor, Mr. Keck and others insisted that both Conveyances being with power of Redemption by Henry Howard and the heirs Males of his Body ought in Equity to be not so restrained. A Mortgage can by no Art or Clauses be so restrained, but the Mortgagor and his Assigns of the Equity of Redemption or his own heirs, though not of his body, may redeem, else it would lie in the power of a Scrivener to make all Mortgages absolute in effect, and to put a bar to the Power and Jurisdiction of this Court to relieve in Cases of Mortgage by inserting such a Clause.

Mr. Keck cited a Precedent 1678. between Killington and Green. The Condition of a Mortgage was to redeem during the life of the Mortgagor. Decreed that the heir might redeem.

2dly. The Covenant on Henry Howard his part to pay the Mony and Interest makes it a Mortgage on Harris's part, and he might sue for the Mony, and it cannot be a Mortgage, but it must be a mutual Mortgage equal to both.

On the other side it was said, that generally it is true, that no restraints could be put on a Redemption where the business is only lending of Mony by the one, and securing the Mony lent by the other; and therefore if the Case

Case were only that Harris had lent, &c. and Howard had made a Mortgage redeemable by him or his Heirs Male, &c. his Heir general or Assignee might redeem; for securing the Mony is the main of the business, but this is not the Case as to the nine Tenements; for it is alledged and proved Sir Robert Howard had long before the Jointure, viz. 1651. absolutely and for a full Consideration by Fine and Deed sold those Lands to the Defendant, viz. the Reversion and Rents 7 l. 10 s. and Harris in possession of the Rents before and till the Jointure made; and the Consideration of the Mortgage 1672. to him by Henry Howard was the precedent Title from the Father of Henry. If it had been so plainly said, that for that reason and because he would only redeem, and so his Heirs Males, it would have been a good restraint, that he and his Heirs Males might have liberty to set on foot his pretence, but no other. If A. in breach of Trust vested in him for J. S. should convey the Lands to B. and B. being intituled under a breach of Trust, conveyed to J. S. on Condition, that he and the Heirs of his body may redeem. B. died without Issue, shall his collateral Heirs redeem, and so as that J. S. should be forced to convey not only the Interest he hath by the Mortgage, but extinguish his ancient Title? for so it is desired here, that Harris should convey to the Plaintiff and so lose his former Title, for which he paid so much, and hath no consideration for it; for his lending of Mony to Howard is no consideration to Harris to lose his Purchase and his Mony which he paid for it.

Again, Harris did really purchase from Sir Robert, it is not alledged or proved how Henry Howard comes to be interested, or what Title Henry Howard had; it is not said so much as in the Bill that Henry Howard was seized of any Estate in Fee or otherwise, but abrupte that he made such Jointure and Mortgage, and prays the Conveyance, paying the Mortgage-mony.

The Defendant sets forth a Purchase from the Father by Fine for valuable consideration. Now if you will have a Reconveyance and redeem, you must shew why the Conveyance to the Defendant is not good by shewing a former Title to the Title of Sir Robert the Conizor of the Fine, or invalidate his Conveyance by some matter, and not only by Replication aver your Jointure; else if a Man take a Mortgage of his own Lands and lend Mony he shall lose his Land for his own Mony, viz. for nothing.

The

Interest on Interest.

The Objection on the Covenant can press no further than as to the other Lands, where the Defendants Title is only the Mortgage.

The Portion the Plaintiff brought is but 1000 l. both her Jointures are near 1000 l. per Annum.

The Lord North, Lord Keeper, decreed the Redemption, but on payment of the Mony, and Interest on Interest; and took a Difference where the Covenant is to pay the Interest and where not, for debt lieth on the Covenant.

Lyford *contra* Coward. 6 Nov. 1683.

Surrender decreed according to Possession.

THE Bill was for a Decree of certain Copyhold Lands, parcel of the Manor of Buckeridge in the County of Berks, and his Title is by a Surrender made long since by Richard Lyford, Father of the Defendant Mary, to the use of his Will, under which Will he claims, because all the Rolls are lost or detained by Blagrave Lord of the Manor, and inforces that the Surrender is to be presumed because that he had been in possession 40 Years, and done Suit and Service to the Court as a Copyholder. Blagrave the Lord denies having any Rolls: The Defendant Mary denies both the Surrender and Will, and that she was but three Years old at her Father's death, whose Heir she is, and since a Feme Covert, and therefore no Laches can be imputed to her, neither in Law nor Equity; and being an Infant did not discover her Title, but lately being Heir to her Grandfather, who made the Will; and for trial of her Title hath brought a Plaint in the nature of a Writ of Ail, as Heir to her Grandfather, viz. Daughter and Heir to Richard, Son and Heir to Richard, who as is pretended made the Will and Surrender.

Writ of Ail.

At the Hearing the Plaintiffs made no proof of the Surrender and Admittance, but proved that he had served several times as a Copyholder at the Court, and produced a Note under Sir Edward Powell's hand of a Receipt of Mony for his admittance; but to what Estate he was admitted

mitted, does not appear. It was also insisted on, that the Plaintiff had paid several Legacies given by the Will; but this was but lightly insisted on at this hearing, (but mainly on the long Possession) because there was Assets enough to pay the Legacies, and the Legacies were personal, nothing at all relating to the Lands.

The Defendants Councel answered: The Possession against an Infant and Feme Covert, was no concluding Evidence, especially against an Heir to support a voluntary Conveyance against an Heir at Law, who had but this Land left her, being but 4 l. per Annum. Whereas the Plaintiff had a great Estate from the Grandfather: And insisted that the Bill was founded on matter meerly triable at Law, whether Will or no Will, Surrender or no Surrender. Possession no concluding Evidence against an Infant and Feme Covert.

But the Lord Keeper insisting much on the Possession as ground to make a Decree for the Surrender;

The Defendants Councel replied, That by the Statute of 32 H. 8. a Writ of Ail is allowed to be brought upon a Seisin within fifty Years: And tho' in some Cases the Court has decreed Settlements without Trial; yet that was always where the Bill was founded on some matter of Equity properly and peculiarly, finally to judge, as where a Trust is built upon a Conveyance, or the like; and the last Judgment is in this Court, which here is not so: And if the Plaintiff thought an inferior Court not capable enough to try the Point, if the Defendant did consent to try it in an Ejectione firme, or otherwise as the Court should direct, which is all the Equity the Plaintiffs could have here. Limitation. Possession.

But the Lord Keeper, tho' much press to the contrary, decreed the Surrender, and left the Defendant to try Will or no Will.

Ratcliff

Ratcliff *contra* Graves. 7 Nov. 1683.

An Executor lends and receives Interest.

AN Executor liable to Debts and Legacies payable in futuro, and having Mony of the Testators in his hands, lends it at Profit, and receives it and the Profit, or Interest thereof. The debate was, whether he shall answer the Interest he received as Assets: Lynch's Case, and other Cases, ante; and the Case of Mr. Cartwright in this Court, (where it was decreed, That the Executors should not be charged, and affirmed in an Appeal in Parliament) were cited; and the reason given then, and now given, because the Executor not being bound to lend, &c. if he do lend, 'tis at his peril; and if it be by that occasion lost, he shall answer the same out of his own Estate: And therefore as he shall bear the Loss, he shall have the Gain.

The Lord Keeper remembred Cartwright's Case, for he said he did not like that Case, for saying also that when the Executor lent it on Security, he might secure himself for a small matter.

Finch Sollicitor. My Lord, the Security so taken may fail.

Keck. It hath been taken here as a Rule that the Executor shall not be charged.

Yet now the Lord Keeper decreed the Executor should be charged.

Lease waiting on the Inheritance, if Assets, &c. Assets. *Vid. Hardres* Rep. accord. by *Hale* in Sir *George Sand's* Case.

Nota, Also that this Term he declared, that where a Lease for Years is to wait on the Inheritance; That it shall be Assets as to Debts as well where the Interest of the Lease is in the hands of a Stranger, and not in the Owner of the Inheritance, as when it is in the Cestuy qui trust, of the Inheritance, and the Interest of the Inheritance in a strange Trustee.

Nota, Contrary to former Resolutions.

Lord

Lord Ranelagh *contra* Thornhill. 17 Nov. 1683.

BIll of Review to reverse a Decree for Mony on account by the Master, whose Report was decreed: The Error alledged was, that the Master had allowed Interest upon Interest, for having made a total of divers Sums paid by Thornhill, and Interest for them. The Master then added other Sums after paid, and then cast up the former total, which was compounded of Interest and Principal, and in the latter allows Interest for the first total, &c. and the Lord Ranelagh being summoned to attend, refused or neglected, and moved to be heard; but because not proper to be moved after a Decree, not allowed by Motion, but now directed to be examined and rectified as to that point, but the rest of the Decree to stand. Interest.

Harding, *and others*, *contra* Marsh, Langley *and others*. 19 Nov. 1683.

ON Commission against Peacock a Bankrupt, sued out by the Plaintiffs: A Distribution was made of 370 l. to the Plaintiffs; after the Plaintiffs in two Suits at Law prosecuted by them, were non-suited in one, and a Verdict against them. Which Suits were to have recovered 600 l. part of the Bankrupt's Estate, and then they exhibited a Bill in Chancery, and there were dismist, because, Bankrupt or not, was only triable at Law; then they sued at Law, and had Judgment, and also Execution for 600 l. Then Langley a Creditor prays to be admitted in, and tenders Charges of the Commission, and that he may be admitted to partake in so much of the 600 l. and other Estate, ultra and beyond what was already distributed. The Commissioners admit him, and call the Plaintiffs to account; which they refusing to do, the Commissioners sue the Plaintiffs on a Covenant which the Plaintiffs had given to the Commissioners, as is usual. Bankrupt after Distribution, and 4 Months, other Creditors may come in, but must not disturb the former Distribution.

The Plaintiffs now sued to be relieved against the Covenant on two Reasons:

First, That after the four Months elapsed and Distribution, no Creditor can come in.

Secondly, They had spent in the Suits 900 l.

The Cause was now heard: The Defendants Counsel argues, that it was true that Langley could not come in to disturb the first Distribution, but might come in for the residue of which no distribution was made; for in that the first Creditors had no more Interest than the Defendant, and there are no negative words in 21 Jac. which makes the restraint: But as to what is distributed by the precedent Law, 13 Eliz. All Creditors, whether they sue out the Commission or no, might at any time come into the Commission; for by that Statute, each Creditor is to have his Proportion, pro rata, out of the Bankrupts Estate, which made the Execution of the Statute in point of Distribution, uneasy and difficult, because it was hard to find out all the Creditors: And on the other hand, it was too great a Power in the Commissioners by that Law; because the Commissioners might have Power the next day after the Commission, or as soon as they pleased, to sell and dispose of the whole Estate: To obviate which, 21 Jac. gives remedy and the words in that Statute, (before Distribution) must not be understood of the Estate that is not distributed.

As I was about to argue that point further, (it having been alledged at the Bar that Langley's demand was vain) for nothing could come to him if he contributed to the Charge the Plaintiffs had been at; for the Estate to come in, viz. the residue, would not be beneficial to him, 600 l. only is recovered, out of which 300 l. and 170 l. being deducted, 130 l. remained; and if their Charges in Recovery were allowed, nothing would remain.

But Mr. Keck, of Counsel with the Plaintiffs, acknowledged the Defendant was to come into the Commission paying the Charge.

The Lord Keeper referred the Account of the Charges to be specially reported by the Master; for Langley insisted that he had born 200 l. in charge with the Plaintiffs, and is to be but at charge of the Commission, not of the Suit; for the Recovery is to their own use, viz. the 470 l. not of unnecessary Suits, where also they failed.

Lampen

Lampen *contra* Clowbery. 19 Nov. 1683.

William Clowbery by his Will gave 2000 l. to the Defendant; Item to the Daughter of the ſaid C. Clowbery when ſhe ſhall attain her Age of 21 Years, or be married, which ſhall firſt happen, the Sum of 500 l. to be paid her, with Intereſt. The Teſtator died, the Daughter Legatee, died under age, unmarried. C. Clowbery her Father, her Adminiſtrator, ſued and had a Decree for the 500 l. and Intereſt thereof, to be accounted from the death of the Teſtator; and Lampen (againſt whom the Decree was) being Executor, &c. brings a Bill of Review. Deviſe.

Where on debate, the Difference was allowed by the Lord Keeper, between a Deviſe of 500 l. to one to be paid at her age of twenty one, or married, there it is due, tho' ſhe died before twenty one; and where 500 l. is deviſed, if, or when ſhe comes to twenty one.

The Point being a meer point in Law, was long debated.

Mr. Solicitor argued, that becauſe Intereſt is to be paid, therefore the Principal muſt be due; and ſaid that the words tranſpoſed are 500 l. with Intereſt, to be paid at twenty one, had made it plain, and the Intereſt muſt be intended for maintenance of the Child in the Interim.

Econtra it was ſaid, that this is contrary to the words, which cannot bear that ſenſe without Violence; and 500 l. and the Intereſt, are by the Will to be paid at twenty one, or Marriage, not before twenty one, &c. And he means it, that the Intereſt computed, viz. from his death, ſhould be paid for her Portion; and this is beſt ſuitable, and ſtands with the words and is rational; Mantica, &c. l. 6. c. 14. In Teſtamentis ratio tacita non debet conſiderari, ſed verba ſolum ſpectari debent. Multa poſſunt movere mentem Teſtatoris quæ nos latent. Ideo, per divinationem mentis durum eſt a verbis recedere.

The Lord Keeper once pronounced a Reverſal of the Decree; but being much preſt, that the intention of the Teſtator would be clear in the Proofs, he declared he would ſuſpend the Decree, and hear their Proofs.

——— *contra* Langton. 24 Nov. 1683.

Mortgage.

MAry —— lent 700 l. and took a Mortgage of Land called Sison, for a thousand Years, in the name of her Brother, and afterwards did purchase the Inheritance in the name of a third Person, and the Lease was assigned to her; she died Intestate, and her Mother took Administration: The question was touching the benefit of this Lease; the Heirs to her (her Sisters) claimed as Heirs against the Administratrix.

A Difference was taken at the Bar, viz. that if Mary had been first Purchaser of the Fee, and after purchased a Lease, it should wait on the Inheritance, and the Administrator or Executor should not have or keep it against the Heir; but here the Lease was first in her.

Lease. Heir. Executor.

Lord Keeper. There is no difference in Reason, and therefore dismist the Plaintiff as to this point; and that the Heirs were to have the Lease to attend the Inheritance.

Wagstaff *contra* Read. 20 Nov. 1683.

Purchaser not hurt in Chancery. Bankrupt.

POrtman became Bankrupt, the Commissioners assign his Estate, whereof the Plaintiff made title to some Goods, and exhibits his Bill against the Defendant to discover the Goods, and their value, and what and how much he paid for them, because as the Plaintiff charges, they came to the Defendant's Possession after the Bankrupt broke: The Defendant sets forth, that what Goods did ever come to his hands, he bought of Portman bona fide, for a full and valuable Consideration, nor did not know, nor had any notice that at the time of buying until the now Bill, he was a Bankrupt, or of any account of his Bankruptcy, and pleads this matter against any discovery.

After long debate the Lord Keeper seemed to incline, that the Defendant being a Purchaser without notice, should not be prejudiced by this Court: But on the other hand; if the Sale were at extream under value, as for 5 s. or the like, then such a general Plea shall not stand; for then the Plaintiff should be disabled to disprove, and any

any Man in the like Caſe ſhould be protected; therefore let the Defendant ſet forth what the Goods were, or what he paid for them.

But the Defendant's Councel objected, that would deſtroy and prejudice the Purchaſer, though he paid the full value; for if he diſcovers what he paid, the Commiſſioners will aſſign the Mony, or if he diſcover the Goods, the Commiſſioners will aſſign them; and ſo the Court ſhall be inſtrumental to wound the Purchaſer. If the Plaintiff can help himſelf at Law by the aid of the Statute, he may, and the Court will not hinder him, but not aid him here: The difficulty to avoid this Miſchief, on either ſide held long diſcourſe, and at laſt ended, that the Defendant ſhould anſwer what and how much he paid; ſo as the Plaintiff did conſent to take no advantage of the diſcovery, but here in this Court, and not at Law: Which the Plaintiff conſented unto by his Councel, and was to ſubſcribe his Conſent, with the Regiſter, and then the Defendant was to anſwer.

Defendant to anſwer, but Plaintiff not to take advantage thereof at Common Law.

Osborne *contra* Chapman.

THE Defendant, as Guardian to the Plaintiffs Wife an Infant, had managed her Eſtate; and on the Treaty of the Plaintiff for the Marriage with the Wife, deſired Account, which was given him: Whereon he and his Councel adviſed three or four days, and then 800 l. was found due to the Wife, which the Defendant by three ſeveral Bonds ſecured to the Plaintiff; and the Plaintiff gave a Bond in 1400 l. to the Defendant to releaſe all Accounts to him, after the Marriage which was had, and the Defendant paid the 800 l. according to the Bonds; but the Plaintiff gave no Releaſe, but now ſued to have an Account, and relief againſt the Bond: But the Defendant inſiſted that his Agreement to make Releaſe proved by the Bond given by him, and by his acceptance of the Mony ſecured by three Bonds; after the Marriage was had he now ought not to have Account.

Lord

Lord Keeper. He accepted of no Mony but of what was due to him; and the Account was made before Marriage when he had no Title, and there is no Releaſe made as there was in the like Caſe by Baſſet, which bound Baſſet, and the Plaintiff greatly favoured in the Accounts, and the Marriage was but one Year ſince, and the Plaintiffs purſuit is freſh; therefore anſwer the Bill.

DE

DE
Term. Sanct. Hill.
Anno Regis 35 & 36 Car. II.
In
CANCELLARIA.

Bonham *contra* Newcombe & *Ux.* 25 January 1683.

THE former Decree, ut ſupra. fol. pronounced to be reverſt by the Lord Keeper North on Pretedents cited and long debated: But order to ſpend, &c. and he would hear the Cauſe ab origine: He diſliked alſo the Entry of the Decree, viz. reciting the Bill and Anſwer; and reading the Proofs, and hearing Councel, decreed it a Mortgage; and therefore not ſtating the Point of Fact, viz. that it appeared thus or thus, &c. And ſo he did lately in the Caſe of the Counteſs of Angleſey.

Hobert *contra* Hobert. 26 January.

THE Suit was to avoid a Conveyance by Fine and Deed to lead the Uſes of the Fine Twenty three Years ſince, on ſuppoſition of Fraud, purchaſing the Fee of the Land for 11 l. worth 60 l. per Annum; the Plaintiff ignorant of the value, but the Defendant well appriſed thereof; and the Plaintiff ignorant alſo of his Title, which he came to the notice of after the Fine. The Bill was diſmiſt. Fraud. Releaſe.

The

The Lord Keeper declared that if one will seal a Release or other Assurance, to one in Possession, for never so unequal Consideration, it shall not be relieved, because of a new Title discovered, unless there be some special Fraud; as if A. having Title, and B. in Possession; B. conveys the Land to A. in trust for B. and then gets A. to convey the Land to him as in Execution of the Trust, whereby A. extinguisheth his Title, &c.

Holby *contra* Holby.

Dower. Judgment. Equality.

THE Defendant recovered Dower against the Plaintiff an Infant; one appeared for the Plaintiff, then Tenant, as her Guardian, being her Grandfather, but Father to the Defendant, then Demandant in the Writ of Dower, and suffered Judgment, for he could do no other; but the Dower was unequally set out by the Sheriff, but the Sheriff not culpable of any Fraud: But great Inequality appearing;

The Lord Keeper declared, that the Plaintiff ought to be therein relieved.

Whereupon a Proposition was made by the Plaintiffs Councel, that either the Plaintiff should set out the whole in three several parts, and the Defendant chuse one part for her third, or if the Defendant would set them out, and they chuse two.

Rich *contra* Rich.

London. Orphans.

IN debate, agreed by the Councel, and not denied by the Court, that a Lease for Years waiting on the Inheritance of a Citizen, shall not be reckoned as a Chattel, to be divided among Children by the Custom.

2dly. It was certified by the Recorder, that if a Citizen convey to a Child Inheritance, tho' it be expressed for advancement, it bars no Child's part; but such Child may come in for a share, &c. with the rest.

3dly. It was debated, whether if a Citizen marry a Daughter, and give Mony with her, and she desire to come in for a share, whether she shall be admitted if the Father do not in writing declare her advanced; and the Sum, as in Inds Law temp. E. 6. or whether she shall not come in?

Lord

Lord Keeper. I regard no By-Law in the Caſe.

Churchill. The Precedents are many, that unleſs the Father do declare her unadvanced, ſhe ſhall come in: We ground not on any By-Law, but the Cuſtom, which preſumes in ſuch Caſe a full Advancement, unleſs the contrary appear.

Anonymus. February, 1683.

A Bill was exhibited for diſcovery; the Defendant pleaded, that he was a Purchaſer for valuable Conſideration, viz. ſo much, &c. and that he had no notice of the Plaintiffs Title, &c. Plea. Notice. Purchaſer.

Ruled by Lord North, that the Plea as to not having notice by way of Plea, was not good; but it ought to have been as to the notice by way of Anſwer, and not by way of Plea, on debate; but yet that the Defendant being a Purchaſer, ſhould not loſe by the Formality of Pleading the benefit of his Plea, if he ſhould anſwer the whole Plea; for if he ſhould anſwer to the time of his Purchaſe, which poſſibly was in facto, after the Plaintiffs Purchaſe, (they were indeed both of them Mortgagees) then the Plaintiff might wound him at Law; he ſhould put in a new Plea, and put in the Point of notice by way of Anſwer, or to that effect was the Order.

Broad *contra* Broad.

A Bill of Review on the Decree was brought to hearing the 22d of Feb. 1683. and the Decree was read and Objections made againſt it. Decree. Form of entring. A Decree.

1ſt. That the Decree was founded on a Truſt, ariſing on an Agreement by the Husband; but the Decree mentioned no ſuch Agreement, but recites it in recital of the Plaintiffs Bill, and then proceeds to recite the Anſwer, and then proceeds to the Decree on this manner: Whereupon and reading the Proofs, the Court decreed the Truſt and Redemption, but doth not ſay that ſuch Agreement was proved: Therefore the Plaintiffs Counſel inſiſted, that the Decree was made on the Bill and Anſwer.

Mr. Sollicitor and others said that it was the Course, and a hundred Decrees were so; and when it is said on reading the Pleas, it is decreed, it is intended that the Matters put in issue are proved.

But e contra it was said, that a Decree ought to be grounded on Fact, ex facto jus oritur, and else by the Clerks Course the Defendants should be bar'd of a Review in all cases; for the Plaintiff in Bill of Review cannot alledge Matter of Fact contrary to what is stated in the Decree to be proved; and it may be many Issues are joined in the Bill and Answer; if this course should hold, all must be admitted, and no Man can truly know on what fact or all the Decree was made, nor any Appeal brought.

The Lord North declared accordingly, and was clear of Opinion, that it was not enough to say (on reading the Pleas) it is decreed, but on reading the Pleas, it appeared thus and thus, and therefore decreed, &c. And on this reason said, that he took no notice of the Agreement; but yet affirmed the Decree, because when the Wife joined in the Fine, sur concessit, of her Jointure, in order to a Mortgage or Security, it was not an absolute departing with her Interest; but there resulted a Trust for her when the Security or Mortgage is paid, to have her Estate again, as if it had been a Mortgage on condition, and the Money paid at the day.

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DE
Term. Sanct. Trin.
Anno Regis 36 Car. II.
In
CANCELLARIA.

Anonymus.

SIR John Churchill ſhewed that a Sequeſtration for Non-appearance was iſſued againſt the Lord Mohun an Infant of Seven Years: Several ill and beggarly Fellows as Sequeſtrators, by colour thereof received the Rents of the Lord Angleſey, and certified the demand of payment of others; A. B. C. &c. Tenants, who refuſed to pay their Rents; whereupon an Injunction iſſued againſt A. B. C. &c. to pay their Rents to the Sequeſtrators, and ſome Tenants were impriſoned, of which he complained, and ſaid, the Lord Angleſey preſent in Court, the Tenants dwelt in Cornwall, and it were hard they ſhould be forced to come to London. At laſt the Lord Angleſey offered to appear for them; and if ſo, and the Contempt in the Tenants did not appear, Coſt to be awarded.

Sequeſtration againſt an Infant Lord for not appearing.

Sequeſtrators receive Rent.

Nota. The Proceſs of Injunction was not againſt Tenants of the Lord Mohun, but A. B. C. &c. by name.

Infant ſent for into Court.

Sir John Churchill ſaid a Meſſenger of the Court ſhould be ſent to bring in the Infant, and when he comes in, the Court ſhall or may aſſign one of the Six Clerks as a Guardian to appear and anſwer, &c.

Lord Keeper. How will that look in the Lords Houſe, that an Infant Peer ſhall put the defence of all his Eſtate in a Six-Clerk, who knows nothing, and cannot be informed by the Infant of his Eſtate, &c. At Common Law the Parol was to demur, and the Infant is not bound to anſwer till full Age: And Execution of a Judgment for debt againſt the Anceſtor cannot be againſt the Infant Heir; and by Act of Parliament the Execution of a Statute is not againſt an Infant, for the Regiſter, Parliament and Common Law give no Execution againſt an Infant Heir, altho' the debt were clear and indiſputable, viz. Judgment, or by Statute.

Yet e contra is done in Chancery.

Hatton *contra* Gray. 14 June 1684.

Agreement by Note tho' ſigned but by one, yet good.

HAtton ſold houſes to Gray for 2000 l. Note was made by Hatton of the Agreement, ſigned by Gray but not by Hatton.

Mr. Sollicitor. The Note binds not him who ſigned it not, for the Statute of Frauds and Perjuries, &c. and therefore in Equity cannot bind the other Party, for both muſt be bound, or neither of them in Equity.

But decreed contrary.

Anonymus. 1684.

Mortgageor borrows more Mony by Bond, the Heir ſhall not redeem without alſo paying the debt by Bond, if that the Mortgageor bound himſelf and his Heirs in the Bond.

MOrtgageor borrows more Mony of the Mortgagee, and gives Bond for it; the Heir of the Mortgageor ſhall not redeem without alſo paying the debt by Bond, if

Eaſt-

East-India Company *contra* Interlopers.
29 June 1685.

THE East-India Company had a Verdict against Interlopers, who in breach of the Charter traded; but the Company not being otherwise able to discover the Particulars of the Commodities, &c. and Damages, exhibited a Bill of Discovery: To which the Defendants gave insufficient Answers, and so reported by the Master; and the Plaintiffs Title being found good at Law, and that their Patents were good in Law to exclude others from trading into those parts, they now prayed an Injunction against the Defendants, to stop certain Ships which the Defendants were setting forth to those parts, to trade in further breach of the Patents: And so the like was done formerly in Case of the Printers for Importing Bibles. Injunction to stop Merchant Ships. *Vid.* Ant. Stationers Case.

Lord Keeper. The Case is of a great Consequence; if it be to stop Actions on insufficient Answers, but to forbid plowing or trading, or the like, I cannot, but will advise. No Injunction to stop trading.

Bond & *Ux. Administratrix of* Elizabeth, *Daughter of* Mary *the former Wife of* Thomas Brown.

The Case.

JOhn Brown, the Great Grandfather of Elizabeth, John her Grandfather, and Thomas her Father: Thomas was seised of the Lands, &c. in question; and they all by Fine and Recovery settled the Lands in question to the use of Thomas for life, the Remainder to Mary for life for her Jointure, Remainder to Stulford and other Defendants, for 99 Years, the Remainder to the Issue Male of Thomas in tail, Remainder to George Brown in tail, &c. The Settlement was in consideration of Marriage of Thomas with Mary the Plaintiff, and 2000 l. Portion. George Brown, on whom the Remainder was settled, was a remote Kinsman, viz. Son of George the Son of John, Father of Thomas. The Marriage took effect, and the Portion paid. Portion given to be paid at 21, or Marriage. The Daughter dieth, her Administratrix sueth.

The Term was by the same Deed, which declared the uses, declared to be to raise out of the Premisses 2000 l. for the Daughter and Daughters of Thomas by Mary, and

Main-

Maintenances Yearly not exceeding 20l. per Annum, if one Daughter 2000 l. and if any Daughter died, the Survivors or Survivor, if more Daughters than one, to have the part of the Daughters dying: viz. If Thomas die without Issue Male, or having such Issue Male by Mary, if such Issue should die in minority or unmarried, the Trustees should out of the Premisses raise and levy 2000 l. for the Portion and Portions of such daughter and daughters, together with a competent yearly Maintenance for every such daughter and daughters, not exceeding 20 l. per Annum, and the 2000 l. to be paid at 21 Years or Marriage, which should first happen. Proviso, if the said Thomas Brown in his life-time, or any to whom the immediate Remainder, &c. should appertain, should within 12 months next after the death of the said Thomas Brown, without Issue Male by the said Mary, either pay or secure the same, and the said Maintenance to the liking of the said Trustees, then the said Term to cease. Thomas died, having a Son, who died without Issue; Elizabeth his Sister then living, and many Years after, till she was 19 Years old, and then died: Mary the Mother took Administration to Elizabeth, and the Bill was to have the 2000 l. and the 20 l. for so many Years as Elizabeth lived, for George in Remainder had entred and received the Profits, but not paid the 20 l. nor maintained Elizabeth.

The Lord Keeper decreed for the Plaintiff as to the Maintenance, notwithstanding that her Grandfather John had by his will given the said Elizabeth 2000 l. so as she needed not Maintenance; but as to the 2000 l. dismist the Bill.

DE
Term. Sanct. Mich.
Anno Regis 36 Car. II.
In
CANCELLARIA.

Whitmore *contra* Lord Craven, & *al.*
December 1685.

William Whitmore having Iſſue only one Son, made his Will in writing, and thereby devi- ſes ſeveral Legacies; and after wills in this manner, viz. Will. Executor.

The Surpluſage of my Perſonal Eſtate, my Debts, Legacies, and Funeral Charges being paid and ſatisfied, I give unto the Right Honourable William Earl of Craven, for the uſe of my only Son William Whitmore, and his Heirs lawfully deſcended from his Body; and for the uſe of the Iſſue Male and Iſſue Female, deſcended from the Body of my Siſters Elizabeth Wiett deceaſed, Margaret Rymmitt and Ann Robinſon; in caſe that my only Son William Whitmore ſhould deceaſe in his minority without having Iſſue lawfully deſcended from his Body. I nominate and appoint my only Son William Whitmore Executor of my laſt Will and Teſtament; I nominate and appoint the Right Honourable William Earl of Craven, during the minority of my only Son William Whitmore, Executor of my laſt Will and Teſtament. And commends and commits the Education and Tuition of his Son to the Care of the ſaid Earl.

In

In the Year 1678. the Teſtator died, his Son being then about the Age of 13 Years. The Earl of Craven proved the Will and paid the Legacies; and the reſidue of his Perſonal Eſtate conſiſted for the moſt part in Cattel, Houſhold Goods, Plate, Jewels, Arrears of Rent, and Debts upon Bond; the Mortgages being not conſiderable.

William Whitmore the Son is lately dead without Iſſue, being above the Age of 18 Years, and under the Age of 19, and had never taken upon him the Executorſhip to his Father.

That William Whitmore the Son a little before his death, made his Will in writing, and thereby deviſed to his Wife all his Eſtate, real and perſonal, and what elſe he could give her, and makes her Executrix.

The Widow ſues for the Eſtate and Surpluſage; the Siſters Children exhibit a Croſs Bill for it: Dec. 1685. both were heard.

The Queſtions were two:

Term. Remainder. Deviſe.

1ſt. Whether the Deviſe of the Surplus to the uſe of the Children in caſe that William the Son did take effect, is good in Law? Becauſe it is to them in caſe William die without Heirs of his Body during his minority; for the Defendant pretended that though a Term or a Chattel given to one, and the Heirs of his Body; and if he die without Heirs of his Body, yet when it is ſo given on a Contingency to happen in a ſhort time, and which is to happen at fartheſt on the death of one perſon, it is good that the Intention of the Will may be performed; and Maſſingbord's Caſe and that of the Duke of Norfolk cited. But e contra it was ſaid, That though that may be true in caſe of a Chattel real, it cannot be in caſe of Mony, or perſonal Chattels, which once veſted, (as here in William the Son) can never be divеſted, never any ſuch Precedent was, or can be; the Inconvenience would be great, and in the caſe of Term or Chattel real, it was long 'ere it was allowed, and the uſe of mony is the mony itſelf.

At what Age an Infant ſhall be an Executor.

2dly. For the Plaintiff, that if it be a good Deviſe, yet the Contingency never happened; for William muſt die during his minority, or elſe the Defendant can have nothing, and minority is not 21, but 17 in caſe of Executorſhip; and minority in the firſt part of the Will is of the ſame Senſe as the word minority is in the latter part; the ſame word in the

the ſame Will is of the ſame Senſe; and the rather becauſe the Executorſhip of the Lord Craven being but during the minority of William, the Executor ceaſeth when William comes out of his minority as Executor: William is firſt named Executor, and then the Lord Craven is made Executor during the minority of William; that is, while he comes to be of 17 Years of Age, and then the Lord Craven hath no more to do. William can ſell, alien, (yea) and deviſe his own Eſtate by Will; the Lord Craven's Intereſt of Executorſhip ceaſeth.

The Lord Chancellor decreed accordingly, and put the Caſe as if the Clauſe of Executorſhip had been in the firſt place, and Lord Craven named Executor during the minority of William; and then if William die during his minority, the reſidue to the Children, it were without queſtion, and the Property at 17 veſted in William, and cannot be deveſted; and ſaid that if the Caſe had been of ſmall value, it had indured no debate, but now ſix Counſel of each ſide have ſpoken.

DE
Term. Sanct. Hill.
Anno Regis 1 Jac. II.
In
CANCELLARIA.

Newdigate *contra* Johnſon.

Account. *London.*

THE Plea of an Account of an Orphan's Eſtate before the Aldermen of London, was diſallowed, and a Surcharge allowed to be made thereon by the Lord Chancellor; who ſaid when he was Recorder of London, he obſerved well the manner of their taking ſuch Accounts: He alſo decreed that the Executor pay Intereſt at 6 l. per Cent. for the Mony he had not paid into the Chamber till he paid it in, though the Chamber uſually takes but 5 l. per Cent.

Intereſt.

Greſwold *contra* Marſham. *Eodem die.*

Mortgage. Loſs. Notice.

THere was due to Marſham 4000 l. upon a Mortgage made to him of Lands: The Mortgagor after the Mortgage, acknowledged three Judgments to other Perſons for other Monies due; two of thoſe Perſons to whom the Judgments were given, gave notice to Mr. Marſham of their Judgments, and deſired him to accept of his Mony that was due upon the Mortgage, which they ſaid they were ready to pay him, and deſired him to appoint a time when, and they would pay him his Mony within a Fortnight, to the intent that his Mortgage being ſet aſide they might

might take Execution on their Judgments, but proved not any mony actually tendered: But afterwards Marsham exhibited a Bill against the Mortgageor, and had a Decree to foreclose him of Redemption; and afterwards took a further absolute Conveyance from the Mortgageor, for a considerable Sum of mony; and now the two Creditors had a Decree against Marsham to pay them their mony; but Powel the third Creditor had no relief, because he gave no notice in time of his Judgment.

Comyns *contra* Comyns. *Eodem die.*

The Case was.

Several Legatees by Will, of Sums of mony in Numero, others in Specie; the Estate would not pay all, the Question was, Whether the Loss should fall only on the Legatees in Numero, or whether the Specifick Legatees should contribute proportionably? Loss. Legacies. Contribution.

The Lord Chancellor was strongly of opinion they ought to contribute; for he said that the Intention of the Testator was as much that one should have all the mony, as the other should have the whole Specifick Legacy; and put the case, suppose three Specifick Legacies be one House, &c. and there is not sufficient to discharge them all by reason of debts, what shall be done there?

E contra, It was objected that the Practice of the Civil Law, and of this Court, had been otherwise.

Chancellor. See Precedents.

Quære, In case there be three Legatees, each to have a House, but particularly A. the Black House, &c. and so to the rest, and the debts so diminish the Estate that the Houses cannot be delivered.

Quære, If there be not a Difference in such case, if the Legacies were particular, viz. the Black House to A. the White to B. &c.

Bodmin *contra* Vandebenden.

Dower.

THE Cauſe came again to be heard before the Lord Chancellor, and after long debate decreed for the Plaintiff, againſt the Leaſe for Years and an old Statute, which Vandebenden had bought in: For the Lord Chancellor ſaid he could not imagine why a Jointreſs ſhould be relieved againſt ſuch a Leaſe, and not the Widow who hath Dower; the Jointreſs comes in by Contract and Act of the Party; the Dower is by Act of Law grounded on Marriage, the Act of both Parties: The Wife in that Caſe is by Law more favoured than the Heir, and the Heir ſhould be relieved; as if a Leaſe be made in truſt to pay debts, the Leſſor dieth, the Heir paying the debts ſhall be relieved againſt the Leaſe, and ſet it aſide; and why not the Wife? I can ſee no reaſon for it: And Vandebenden could not but have notice that the Lord Bodmin was married, when alſo Vandebenden had a Statute of 10000 l. from the Lord Bodmin: But the Defeazance thereof appeared not.

Some of the Counſel inſiſted on it as a ſtrong Proof, that Vandebenden had Abatement in reſpect of the Plaintiffs poſſibility of Title; Others inſiſted that a Leaſe being created by the ſame Settlement, by which the Inheritance was ſettled only on a particular Purpoſe, and then to wait on the Inheritance, ſhall be never applied to other purpoſe in Equity, but is as a Non ens: Others preſſed, that the Wife for her Dower is in Law in the Per, by her Husband, and ſhall be intituled to clear all Incumbrances, as well, and more than the Husband.

Nota, The Wife had not Dower executed, for the Judgment in Dower was with a Ceſſet Executio during the Term.

Dominus

Dominus Ward *contra Dominum* Meath.
1 March 1685.

A Bill was exhibited in Chancery againſt the Huſband and Wife for Lands in Ireland: The Huſband appeared for himſelf, but departed without making Anſwer; upon which Proceſs continued againſt him to a Serjeant at Arms, and now, the firſt of March 1685. the Plaintiff preſt for a Decree againſt the Huſband and Wife pro confeſſo. In the interim pending the Proceſs againſt the Huſband, the Wife got an Order to appear and anſwer; and did anſwer, ſetting forth a Title to her ſelf of the Inheritance, and therefore no Decree could be againſt her. The Court decreed the Bill pro confeſſo againſt the Huſband only, that he account for all the Profits of the Land received ſince the Coverture, and the Profits which ſhall be received during the Coverture, &c.

Baron & Feme.

Wife anſwer without the Husband.

Proceſs.

Decree *pro Confeſſo* againſt the Husband.

Hutchins pro Def. What if it appear upon hearing of the Wife, that ſhe hath a Title?

Keck. We cannot proceed againſt the Wife, for her Anſwer is no Anſwer, being made without the Huſband's Anſwer.

Wife's Anſwer no Anſwer without her husband.

Note, By the Proceedings in this Cauſe no Decree can ever be had againſt a Feme Covert for her Inheritance, if the Huſband will not appear.

Mr. Sollicitor, who was a Councel for the Defendant, upon reading of this Report to him, told me that the Defendant never did appear; but a Commiſſion being taken out for the Huſband and Wife to appear, it was taken by the Court as if he had appeared, though it was never executed for him.

Reſp. Quære, For an Eſſoin, or an Original Writ caſt or taken out in the name of a Party, is no Extort, &c.

Barker

Barker *contra* Turner. 5 March 1685.

The Case.

Copyhold. A Copyholder to him, and the Heirs Male of his Body, purchased the Fee-simple to him and his Heirs; and afterwards for a valuable Consideration, viz. 300 l. sold the Land, and conveyed it to the Defendant, who was in possession divers Years. The Copyholder died, leaving Issue a Son, a special Verdict was found at Common Law; the Question being, whether the Son hath Right or no?

Now the Lord Chancellor was of Opinion for the Purchaser, and that the Conveyance was good against the Heir; for the Copyhold being severed from the Manor, there is no means to bar it; but by Conveyance at Common Law, the Intail is not within the Statute of Westminster the Second.

But the Lord Chancellor took time to advise.

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DE
Termino Paſchæ
Anno Regis 2 Jac. II.
In
CANCELLARIA.

Holley *contra* Weeden. 1686.

THomas Caſtle, Anno 1657. borrowed of the Plaintiff ſeveral Sums, viz. 200 l. and bound him and his Heirs by Bond for payment, and died ſeiſed of the Lands in Fee; which deſcended to his Daughter, and on her death without Iſſue, to the Defendant Robert, and he entred, the Mony being unpaid. The Plaintiff, Mich. the 16th of Car. 2. filed a Bill againſt Robert, as Heir, who pleaded riens per deſcent, and Verdict againſt him at Norfolk-Aſſizes; but before the day in bank Robert died, ſo as the Plaintiff could not have Judgment. Robert left Robert an Infant, his Son and Heir. Heir pleads a falſe Plea.

Then, Trin. 31. Car. 2. the Plaintiff filed an Original againſt the Infant in the Common Bank; and Michaelmas laſt Robert the Infant coming of Age, the Plaintiff declares againſt him on the two Bonds, who pleaded riens per deſcenſum die Brevis, and Iſſue was joined.

The Defendant pretends that Robert the Father by his Will deviſed the Lands to the Defendant Weeden, &c. a little before his death.

The

The Plaintiff exhibits his Bill to be relieved againſt the Will, and preſſed that he ought to be relieved, for the Lands were liable in Law to his debt; and the Plaintiff while they were ſo liable, did do all the Law required in ſuing Robert while he was ſeiſed of the Lands by Deſcent, and renewing the Suit againſt the Infant, and muſt have had Judgment againſt Robert if the Act of God, viz. the death of Robert had not prevented it; and it is not reaſon that a falſe Plea ſhould advantage and profit himſelf. Parker and Dee's Caſe. And if the Suit had abated by other occaſion, yet in a Writ by Journey's Account, though Robert, had aliened the Land on valuable Conſiderations; yet the Land had been liable, and by the Suit attached, Robert is diſabled by Act executed, (Feoffment, Fine or otherwiſe) to diſcharge the Land any more by his Will.

The Lord Chancellor diſmiſt the Bill.

Drury *contra* Hooke. 1686.

Broakage. Bond.

THE Plaintiff gave a Bond to the Defendant, conditioned in effect, that if the Plaintiff married A. S. then the Plaintiff to pay a certain Sum of mony.

A. S. was a young Gentlewoman, and had 2000l. Portion; and the Plaintiff being about Sixty Years of Age, and having Seven Children, made uſe of the Defendant to procure the Marriage; and he did it, and put the Bond in Suit, the Bill was to be relieved againſt the Bond.

Mr. Finch and others for the Plaintiff, preſt the great Inconvenience of ſuch Broakage, eſpecially in the caſe of young Perſons, and it were prejudicial to the young Woman.

Serjeant Rawlinſon and others e contra. We are Defendants not Plaintiffs, and the Bond is good at Law; and in the Caſe between Creſſey and Crooke, the Court gave no relief in the ſame Caſe: Which was, that the Lady Shipdain, being a rich Widow, lodged in

in Crooke's Houſe, and Creſſey agreed with Crooke that if he could get him Acceſs to the Lady, he would give him a Sum of mony if he married her, and gave Bond to pay it: The Marriage proceeded, Crooke put the Bond in Suit: Creſſey ſued in Chancery to be relieved, and was diſmiſt.

Lord Chancellor. Great difference of a Widow forty five Years of Age, and a young Maiden that has no Friends to adviſe her; and therefore decreed for the Plaintiff.

Such Bonds are of very ill Conſequence.

DE
Term. Sanct. Mich.
Anno Regis 2 Jac. II.
In
CANCELLARIA.

Attorney General *contra* Ryder. 12 Octob. 1686.

Legatees.

SIX hundred pounds devised for Ejected Ministers:

First, The King had disposal of the Mony.
Secondly, A Legatee where there were many Legatees, sued for his Legacy.

The Executor sets forth, that there were divers other Legatees, and that there was not sufficient Assets to pay all; and therefore insisted, that the other Legatees might be Parties, that they might come into the Account and abate equally, else the Executor should be put to divers Accounts, and the Account with one will not bind the rest.

But to that the Lord Chancellor regarded not.

Thirdly, The Executor sets forth a Revocation of the Will, by which the Legacy was given.

Will under *Probate Ecclesiastical* not triable here.

Lord Chancellor. The Will is under Probate Ecclesiastical, and I will not try it here: Go to the Ecclesiastical Court, and prove it there.

Burton

Burton *contra* —— 29 October.

ORdered that a Report made in the Cause, be referred back, but the Defendant to pay Costs if he changed not the Report considerably; but no time being prefixed in that Order for the Master to report, by a subsequent Order the Report was to be made by the Third of November. The Master was attended several times, and a few days before the Third of November gave a Certificate that he was ready to report, but by reason of its Length and Schedules of Particulars, he could not finish it within the time; and without further Order for further time, did finish his Report, which was done four or five days after the Third of November: The Draught of which Report the Plaintiff perused, and the Report was filed: The first Report and the second differed 3700 l. so that the Report was to the advantage of the Defendant 3700 l. &c. but the Plaintiff proceeded to the hearing of the Cause; and the second Report being made out of time, viz. after the time elapsed for the making thereof, the same was disallowed, and the first Report decreed. But if the Defendant would bring into Court the Mony first reported, the second Report should be considered. And the Plaintiff got Costs tared to 140 l. or thereabouts: And now the Defendant moved, that he being also but a Trustee, might be discharged of the Costs, which were not settled by the Decree, but imposed only as a Penalty in case he caused the Plaintiff to travel in the Report without just cause, which he had not done, as appear'd by the Report.

Second Report.

Report made out of time, disallowed.

The Lord Chancellor disallowed the Motion, and ordered the Cost, unless the Defendant would bring the Mony first reported into Court, and shewed much displeasure against the Master for making and filing the Report without warrant expressing, as if it had not been gain'd gratis.

Lady Harvey *Defendant, at the Suit of* Thomas Harvey, *Executor to* John Harvey *her late Husband.*

The Case was, viz.

Parol Agreement against Trust by Deed.

There was a Marriage agreed to be between them; she brought him a great Personal Estate value 20000 l. and she was seised of Lands of the yearly value of 1200 l. or more, and his Land about 800 l. per Annum; and both were agreed to be settled for their Lives on them, Remainder in tail Male to their Sons, and the Fee-simple of her Lands in default of the Issue Male, as she should appoint, &c. and in default of such appointment, to him and his Heirs, for that there had been long Love, &c. between them. Sir John Coel was indifferent Councel to draw up the Conveyances; and when John Harvey came to Sir John Coel, he then took notice that if the Lady's Land should be settled as aforesaid, then the same would be obnorious to Sequestration: For John Harvey had been in Arms for King Charles, and at that very time was secretly engaged in a Plot for the King; thereupon he consulted with Sir John Coel how to avoid that Mischief: Who thereupon advised, and drew up the Settlement with a precedent Interest and Estate, for Years to be in Trustees: In trust that the Trustees, their Executors, &c. should dispose of all the Rents and Profits of the Lady's said Land from time to time, as she alone should without her Husband dispose, and to such Persons as she alone should direct; and with a Covenant by John Harvey, his Executors, &c. for performance.

Accordingly it was done, the Marriage took effect, and they lived about 20 Years: John Harvey in presence of his Wife made his Will, and acquainted her therewith; whereby he gave her all his Jewels, and 20000 l. to be laid out in Land, and his Wife to be estated therein for her life, and gave her other Legacies; but made the Plaintiff Thomas his Executor, and gave to him the residue of all his personal Estate, and died.

Some

Some time after his death Differences arose between the Lady, and Thomas the Executor: The matter was, viz.

John the Husband and his Wife living so long together, he, notwithstanding the said Trust excluding him from the Profits, and his Covenant, did constantly take all the Profits, and disposed of them in House-keeping, and otherwise as he pleased, and they both made Leases to Tenants without the Trustees; but now the Lady upon the Covenant would have Account and Satisfaction, for the Profits received by her Husband, from the Plaintiff, who exhibits this Bill to be relieved against the Covenant, for that the Lease for Years was made only to protect the Wife's Estate against the Violence of those times, and not to exclude the Husband, but the Sequestrators: And in proof hereof, Sir John Coel, who was a Master in Chancery many Years, and of a very clear Reputation, did fully depose thereto; and the change of the first intended Settlement was by the appointment only of John Harvey; and though his Testimony was single, the nature of the Case required Secrecy, and the subsequent Perception of the Profits without Complaint or Interruption by her or the Trustees, and Leases aforesaid, and the Testimony of a Woman that the Lady had expressly affirmed she had not made any such, (but this Testimony of the Woman was not much insisted on by the Plaintiffs Council or the Court;) but there were some other Settlements of Personal Estate to the like purpose to have been made, which were never made nor insisted on to be made; because Cromwell shortly after dying, then John Harvey thought himself out of the danger. But on the contrary, it was very fully and at large insisted on, that against Conveyances by Fine and Deed on consideration of Marriage, and so great Portion, and settled by Advice of Council, the Court might not relieve against a Trust express in a Deed indented; and how dangerous such a Precedent would be, and the silence of the Lady not interrupting or complaining of the taking of the Profits during her Husband's life was not considerable, for it may be that she was not willing to displease him, and she knew her Husband had a great Estate to leave, and hath left sufficiently to satisfy her of the Covenant; on which she desired nothing in this Court, but would take her remedy at Law, which she hoped that the Court would not hinder, and not let it be in the power of any single Person of what Credit

or

or Reputation ſoever he be of, againſt a Settlement by Deed, Fine, Conſideration.

But on this Point chiefly the Court decreed for the Plaintiff againſt the Widow, and ſo did Sir Harbottle Grimſtone do before; and on re-hearing of that Decree it was affirmed by the Lord Finch; and now on a third hearing confirmed by the Lord Chancellor Jefferies.

There was another matter moved and inſiſted on, viz. If in ſuch caſe of Separate Maintenance, the Wife permit the Husband ſtill to receive and ſpend poſſibly in her Maintenance, that the Executor of the Husband after his death ſhould be put to account.

But I obſerved not that the Lord Chancellor now grounded his Decree on that.

Hale *Executor of* Roſe Hale *contra* Anthony Thomas. Novemb.

Judgment on Bond.

SIR Anthony Thomas, and Samuel his Son and Heir apparent, were bound to Roſe Hale, Anno 1637. each of them and their Heirs in 2000 l. to pay Roſe Hale 1300 l. at days ſhortly afterwards, which was not paid; whereupon Hale the Plaintiff, as Executor of Roſe Hale, obtained Judgment on the Bond for 2000 l. and 12 l. Damages and Coſts againſt Samuel, and by Bill in Chancery againſt Anthony the Defendant, Brother and Heir of Samuel, ſetting forth that Samuel had died ſeiſed in Fee-ſimple, but that Anthony the Defendant had purchaſed in truſt for himſelf, a precedent Statute made to one Dagnall, which was ſatisfied in Equity by Perception of Profits. Anthony ſets forth by his Anſwer an Intail made by his Grandfather, and deſcended to him, and denied that Dagnall's Statute was ſatisfied. As touching the Intail a Trial at Bar was directed; and that the Defendant ſhould not give in Evidence, the Statute and a Verdict was for the Plaintiff againſt the Intail.

And as touching the Statute the Plaintiff moved, that the Defendant might either purchaſe and ſatisfy the Plaintiffs Judgment, or to account before a Maſter whether ſatisfied or not, on penalty to pay Coſts of the Suit, in caſe that the Statute were ſatisfied. The Maſter reports the Statute ſatisfied, and 4000 l. more, viz. 1400 l. by Sale of

of Lands, and the rest by Perception of Profits; and decreed that the Plaintiff should proceed at Law.

The Costs were paid, and liberty given him to enter Judgment on the Verdict.

The Plaintiff took out a Scire facias in the Common Pleas, and hath there Judgment to take Execution; which he accordingly did on the first Judgment by Elegit, and extends Lands and Houses of the true yearly value of 350 l. per Annum, by the extent of 40 l. per Annum.

The Defendant on Affidavit of this, moves in Common Pleas to stay the filing of this unreasonable Extent; which the Plaintiff opposed, because that now his Debt and Damages amounted to 5 or 6000 l. and could not be satisfied by an ordinary Extent for 2012 l.

Thereupon the Defendant brought into Court mony in Baggs; (viz.) The 2012 l. and prayed a stay of the Extent, according to the Books 16 H. 7. and other Authorities; for the Law provides for the Plaintiff, that the Extent at too low value shall not be obtruded on him, for in that case he may pray that the Extenders shall pay him his mony, and hold the Lands extended at the extended value, which they must do, and shall: And on the other hand, if the Extents be too low, the Defendant hath his remedy by tender of the mony to stay the Extent, which by the Laws and Authorities of the Books he may do before the Extent is filed, and so stay the Extent; or after the Extent at any time, he may tender so much as remaineth to be levied by or according to the Extent, and compel the Plaintiff to receive it; and the Extent shall thereon cease, and be discharged, and a Scire facias lieth in that case; and for that reason the Defendant hath no remedy against the Extent, when once filed, but by that Course; and therefore the Defendant, now when the mony lay in Court, prayed that the Extent might be stayed, and the Plaintiff receive the 2012 l. The Court was satisfied that the Extent ought to be stayed, but would not adjudge the Plaintiff to receive it; but left that for the Plaintiff to do what he would.

Thereupon the Defendant took out a Scire facias against the Plaintiff, to shew cause why he should not receive the 2012 l. and the Extent be stayed: To which (Writ being served) the Plaintiff appeared not, and Judgment thereupon given in Communi Banco, that the Land be discharged of any Extent.

But

But then the Plaintiff petitioned the Lord Chancellor, that the Cauſe might be reheard in Chancery on the Original Bill, ſetting forth in his Petition the Maſter's Report, and the Stop of his Extent upon this Judgment; and now the Cauſe came to be heard accordingly.

Mich. Term. 2 Jac. 2. Serjeants Rawlinſon and Hutchins, and Mr. Finch, Mr. North, Mr. Keck, and others of Councel for Hale the Plaintiff. The Bill was opened, and the other Proceedings in Chancery; the Equity they pretended to ariſe to them, becauſe that the Defendant having as the Maſter reported, been over-paid above Bagnall's Stat. 4000 l. he immediately after that Statute ſatisfied, received the Profits in wrong of the Plaintiff; and as ſome of the Councel expreſſed it, became a Truſtee, or in nature of a Truſtee, for the Plaintiff, which had not the Plaintiff been hindred from extending at that time by the falſe Plea of the Defendant, by ſetting forth an Intail and Extent falſly, the Plaintiff by his Extent would have had.

In anſwer to which the Defendant inſiſted:

1ſt. That when the Creditor lent the mony, and choſe his own Security by taking a Penal Bond for it, he made himſelf Judge what Recompence he ſhould have in caſe the Obligeor perform'd not his Agreement; ſo as if a Man agree to do or not to do ſuch or ſuch a thing, and take Security to do it or not to do it, This Court ſhall never enlarge his Security, and better it for him; and to that purpoſe Curtis and Dawes Caſe was put, and Elliott and Hales Caſe.

And in the debate of this Caſe, the Lord Chancellor by way of queſtion askt the Plaintiffs Councel, If a Man for mony takes a Mortgage, and lets the Intereſt ſurmount the value of the Mortgage, ſhall this Court mend it?

As to the Falſhood of the Anſwer, the Anſwer was not a contrived known Falſhood; for 1900 l. was ſatisfied not by Profits but Sale; and as to the Intail, it was not falſe but true, for the Land was intailed: But the Plaintiff Hale at the Trial produced a Fine levied by Samuel Thomas our Brother, which Fine was not of a third part of the Houſes intailed, and conſequently not of that third part till Election of the Conizee and Ceſtuy que uſe; which never was done, as if Tenant in Tail of Three hundred Houſes

houſes or Acres of Land, levy a Fine of One hundred; it is no bar of all or of any part till Election made, and till Election the Lands remain intailed: Upon which grounds we firſt inferred, that our Allegation that the Land was intailed and deſcended ſo, was not falſe, at leaſt it was a probable and diſputable Point, and not culpable to be alledged, to draw upon us a Penalty beyond the Penalty of a Bond, as was endeavoured.

2dly. The Report of the Maſter that chargeth us with the Profits of the whole Land, when part was only bar'd, is a wrong to us, which now we may alledge at the hearing of the Cauſe at large; for in truth the Plaintiff was not appriſed of this before the Maſter.

Laſtly, The Plaintiffs Bill being to ſet aſide Incumbrances, to the end he may have remedy at Law, and had a Decree that he might go to Law accordingly, and in 1684. purſued that Decree, and had an Order to take Execution on the Judgment, and after took out (in purſuance of the Decree) a Scire facias to have Execution, as he did the 33d of Car. II. and Judgment thereupon to take out Execution without Damages, for in a Scire facias no Damages are ever given, and after that Judgment took out an Elegit, which forced us to bring in our mony, or lie under that unreaſonable Suit, where it ſtill remains; and it is too late now ſince he has made his Election to go from it, and it was a ſtrange Caſe where a Man has obtained a Decree to proceed at Law; and having proceeded at Law, hath got as much as the Law will give him, then to fly off from his firſt Decree and Proceeding at Law, to have a new and another kind of Decree, and more than ever he asked in his Bill: By the firſt Decree and Judgment, and Proceedings, our Perſon is not charged, but by this new Proceedings he would charge our Perſon, and turn a real Charge upon our Lands into a perſonal Charge upon our Perſon.

In the Debate the Chancellor asked what remedy we had at Law for our mony, which we had paid into the Common Pleas Court.

And after long debate, the Court diſcharged the Order on the Petition, Novemb. 1686. The Lord Chancellor in the debate inſiſted that the Plaintiff had made his own Election by taking Execution by Elegit.

Durſton *contra* Sands.

Patron took Bond to reſign.

THE Defendant, Patron of the Church of in Gloceſterſhire, took a Bond from the Plaintiff to reſign upon requeſt.

Perpetual Injunction.

Upon hearing the Cauſe, a perpetual Injunction was decreed againſt the Bond.

For the Court, and all ſides agreed, that the Bond was good; yet if the Patron made uſe of it to his own advantage, by detaining Tithes or the like, the Court would relieve againſt the Bond; and in this caſe the Patron did detain his Tithes from the Plaintiff, whom he had preſented; he pretended in his Anſwer a Modus decimandi, but made no proof of it, and being Patron of ſeveral other Churches had taken Bond from thoſe he had preſented, and made ill uſe of it.

Hall *contra* Thomas.

Vide Ante *Hall.*

THE Report of the Maſter, which chargeth Dagnall's Statute (which was precedent to the Plaintiffs Judgment) to be ſatisfied; and upon which Report the Plaintiff was let in, and now the Plaintiff being ſtaid ut ſupra, from further Execution: Yet now prayed a new Hearing of the Original Cauſe, inſiſting that by the Maſter's Report it did appear that the Defendant after Dagnall's Statute ſatisfied, had received of the Profits 500 l. per Annum, and ſo on the whole matter had received 4000 l. and as ſoon as he had ſatisfaction of Dagnall's Statute, he became in the nature of a Truſtee, and reſponſible to the Plaintiff for the Profits received.

But in regard of his taking Execution by Elegit, the Lord Chancellor would not relieve the Plaintiff in that Point, but inclined againſt the Plaintiff on that Point alſo.

But if it had come into debate, the Maſter's Report muſt have been re-examined, and would have failed.

1ſt. Be-

1. Because there was a grand Mistake therein, for he computed 500 l. per Annum for two Years to amount to 1500 l. which cannot be. 2. But a greater was the Intail of the Houses is of 300 and more, and the Fine levied to bar the Intail was not of 300 but of 80, or thereabouts, which in truth bar'd no part till Election of the Conizee, &c. but clearly could be no bar of more Houses than are comprehended in the Fine. But yet the Master hath charged the yearly Profit, being 500 l. on the whole Houses, in satisfaction thereof. 3. Another Error in the Report is, that 1900 l. was raised by Sale of part of the Inheritance, which is not wholly to be so charged; for the Inheritance is not to be sold to satisfy the Profits, but only the annual Profits.

Canning *contra* Hicks. 26 Decemb.

Testament. Legacy.

MOrtgagee where the Mortgage was of the Fee-simple to him, deviseth 100 l. and other Legacies, and then adds a Devise of 100 l. to the Defendant, whom he makes Executor, and dieth.

Two Points were decreed:

1st. That the Executor shall have the Benefit of such a Mortgage, viz. the Land, and not the Heir, though the Land be descended to him.

2dly. That the Legacy doth not bar the Executor of the Mortgagee, though it was much prest by Mr. Finch and others to the contrary, and that it was an Implication that the Executor should have no more than the 100 l. because the Testator expressly willed that the Executor should not be paid his Legacy till after his Debts, and other Legacies paid; so that the 100 l. is as much in this case, as if he had expressly devised the 100 l. out of the residue of his Estate after his Debts and Legacies paid, which doth strongly infer he meant no more than the 100 l. not the whole residue.

The Lord of Kildare *Plaintiff*, *Sir* Morrice Euſtace *and others*, *Defendants.*

A Leaſe for fifty Years was made by Sir Morrice Euſtace deceaſed, in Truſt for George Fitz-Garrett: That George Fitz-Garrett was attainted of Treaſon in Ireland, and an Office found, whereby the Truſt was forfeited to the King, and derives Title to the Truſt by Grant from the King, and prays that the Defendant, who is Executor to the Leſſee, may execute the Truſt, and aſſign the Leaſe. The Defendant by Anſwer confeſſeth the Leaſe and Truſt; but that George Fitz-Garrett who was attainted, was not the Ceſtuy que Truſt, but another Perſon who in truth was a Rebel in Ireland, and attainted of Treaſon; ſo as the King had no Title, and that if the King had any Title, yet the Bill in Equity did not lie; becauſe if all were true, yet by the Act of the Settlement, which gives all Lands of the Rebels in Ireland which they or any in Truſt for them, ſhould be to the King; thereby the Eſtate of the Lands is in the King, and not only a Truſt: And ſets forth further, that thoſe Matters had been queſtioned in ſeveral Suits, viz. whether that Sir Morrice Euſtace the Leſſee, were the ſame Perſon who was attainted or no, or whether the Eſtate or a Truſt only veſted in the King? and that the now Plaintiff had had three Suits by Bill in Equity, and alſo a Bill in Chancery in Ireland, which he waved, (I think) diſmiſſed, and the Defendant had two Verdicts at the Bar in Ireland for his Title, viz. That Sir Morice Euſtace the Leſſee was not the Perſon attainted, but another of that name; and thereupon the ſaid Mr. E. coming into England to defend himſelf, the Plaintiff did diſmiſs his Bill in Equity in Ireland, and exhibited this Bill.

The Cauſe being heard here, the Lord Chancellor doubted whether as this Caſe is circumſtanced, viz. after two Verdicts and Judgment in Matters triable in Ireland, viz. which of the two was the Perſon who was attainted, and the Point in Law upon the Act of Settlement, he could not determine it, and Precedents directed to be ſearch'd: And the Chief Juſtice of the Common Pleas, and Chief Baron of the Exchequer to be attended with them, which

which was done; And now the Cauſe, the ſaid Judges aſſiſting, came to a hearing, and the Plaintiffs Councel Serjeant Holt, Mr. Finch and others, argued for the Plaintiff, making the queſtion to be, whether a Truſt of Lands in Ireland, and the Truſtee being here in England, this Court hath Juriſdiction; for this Court cannot execute their Decree by Sequeſtration, or giving Poſſeſſion of Lands in Ireland they can compel the Party; and in the caſe of Partition, the Court here decreed Account of the Profits, although they diſmiſſed the Bill as to the Partition of the Lands: And though here the Court will not grant Sequeſtration as in the Caſe of Partition, nor name Commiſſioners in Ireland to make the Partition; yet they can compel the Party to convey by Impriſonment, and otherwiſe there would be a failure of Juſtice; for they in Ireland cannot relieve becauſe the Party is here, and we here becauſe the Land is not here.

So no Juſtice could be done, and the Bill diſmiſt.

DE

DE
Term. Sanct. Mich
Anno Regis 3 Jac. II.
In
CANCELLARIA.

Alderman Backwell's *Case.* 8 Nov. 1687.

Commiſſion of Bankrupt.

Superſedeas.

A Commiſſion of Bankrupt iſſued againſt Alderman Backwell, and the Creditors who ſued out the Commiſſion were compounded and agreed with; and thereupon a Superſedeas to the Commiſſion was granted. The Earl of Exeter, and a hundred other Creditors, petitioned that the Commiſſion may be revived, and the Superſedeas, quia improvide emanavit, ſet aſide.

And by Pemberton Serjeant, and others, inſiſted;

1ſt. That they were the greateſt number of the Creditors who deſired it.

2dly. The Commiſſion is de jure granted, and could not at firſt have been denied.

3dly. And when it is once granted, then all the Creditors, every one of them, are intereſted in the Benefit and Proceeding of the Commiſſion equally with the reſt of the Creditors, at whoſe Petition the Commiſſion was granted; ſo as they came in, and pray to be admitted within the four Months, and tender their Contribution.

4thly.

4thly. And the Non-Petitioners now pray to be admitted, and though now the four Months be past, it is not their fault, because the Superſedeas being granted within the four Months, they could not be blamed, for they had time till after four Months.

5thly. And ſeeing they were intereſted in the Commiſſion as well as the Petitioners for the Commiſſion, the other Creditors cannot hinder them from coming now into it, without which they ſhould loſe their debts.

The former debates on this matter did produce ſome Propoſitions of Accord, from Mr. Backwell, Son and Heir of the Alderman; which now not being acquieſced in, &c.

Lord Keeper. I hold that the Commiſſion is de jure, and the Statute which ſaith the Chancellor may grant, &c. is as if it had been, ſhall grant or ought to grant; but he cannot grant ex officio, but on requeſt of Perſons intereſted. If twenty Men ſwear before me, that J. S. is a Bankrupt: Yet without Petition of a Creditor I may not award a Commiſſion; but when it's once granted, if the Perſons that petition were well ſatisfied, I do think a Superſedeas may be granted as well within the four Months as after, poſſibly they who petition find that it is beſt for them ſo to have it; for if their Debts be by Judgment, they will be preferred before others: Whereas on the Commiſſion they muſt come in but in proportion with others, and it is quæſtio Juris. I will hear it aſſiſted by Judges.

No Commiſſion of Bankrupt granted without Petition of a Creditor.

Note, When once a Commiſſion is granted, it's folly for the other Creditors to ſue for their Debts at Common Law or Chancery; for if they ſhould recover, yet it will not avail them, but they muſt be liable to the Commiſſion; ſo if they had Judgment not executed 'twere vain to ſue Execution, and therefore Time is given to all Creditors, viz. four Months to come in; and if they might be hindred to come in before the four Months, it might be made a Trick to couſen them, viz. A. hath Judgment, B. ſueth out a Commiſſion, compounds, &c. and takes ſatisfaction, gets a Superſedeas. A. could not have Execution.

After-

Afterwards other Creditors petitioned the Lord Chancellor, Sir George Jefferies, Baron of Wem, to take off the Superſedeas, and to renew the Commiſſion.

which was much oppoſed by Mr. Backwell, Heir to the Alderman, who had after the Superſedeas granted, and granted at the Suit of all the Creditors, who petitioned at firſt for the Commiſſion, compounded and agreed with the ſaid firſt Petitioners.

And now the 8th of November 1687. The Attorney General, Pemberton, Holt, Serjeants, Mr. Finch and others, argued very earneſtly againſt the granting of the Commiſſion:

1ſt. Becauſe Alderman Backwell, againſt whom the Commiſſion was firſt granted, was dead, and was not in his life declared a Bankrupt.

2dly. Becauſe by the death of the King, the Commiſſion is determined, as all other Commiſſions are; and if the Stat. Jacobi had not provided otherwiſe, the Commiſſioners could not have proceeded after the death of the Bankrupt, though they had acted or dealt in the Commiſſion before the death of the Bankrupt; but the Statute provides for that Caſe, but doth not provide in caſe of Abatement of the Commiſſion by the King's death, with whom all Commiſſions died alſo; and they argued much that by the words in the Statute, viz. (dealt in) is meant a Proceeding by the Commiſſioners, (as Holt ſaid) till diſtribution, (as others ſaid) till the Party were declared Bankrupt.

Lord Chancellor. I am no Friend to the Commiſſion of Bankrupt; it hath occaſioned much hurt, and inſtanced in a Caſe lately before him, wherein the Charge and Expences of the Commiſſioners, and their Attendance, came to 400 l. and the Diſtribution to the Creditors 7 s. in the pound; each Commiſſioner claimed 20 s. per Diem, 10 s. half a day, &c. but as to this Caſe I do renew the Commiſſion for the Agreement of the Perſons who firſt petitioned; for the Commiſſion cannot prejudice any other Creditor that did or might come in and contribute, yea, tho' there ſhould be but one ſuch Creditor for the Petition; for the Commiſſion is expreſly in behalf of themſelves and all other Creditors; and the Commiſſion is ſo granted, and cannot be

other-

otherwise, so as the Petitioners for the Commission are no more concerned than others, or any others that shall come in; and the Statute that gives continuance to the Commission when the Bankrupt dieth, maketh it all one as if the Bankrupt died not; for tho' he be dead, yet as to this purpose he is still living.

(Lord Chancellor to Pemberton.) Suppose Backwell were living, and the King dead, Might not the Commissioners proceed, or grant a new Commission?

Pemberton. Yea, a new Commission.

(Chancellor.) Yes, and proceed where the other left, and their Proceedings as effectual as the former, or any Acting of Commissioners: If it be but receiving Mony for Contribution, (as they did of some) of the new Petitioners, is a dealing within the words of the Statute. And in fine he granted the Commission.

Note, The Supersedeas was granted within the time the Statute gives to Creditors, who did not petition to contribute; and they being now by Act of Court disabled, may not they after renew?

CASES

Omitted in the Former PART of

Caſes in *CHANCERY.*

DE

Termino Paſchæ

Anno Regis 26 Car. II.

In

CANCELLARIA.

Taylor *contra* Beverſham.

The Caſe.

Rebutter of Equity.

SHephard ſeiſed of a Copyhold held of the Manor of D. Taylor purchaſed the Copyhold, and after he alſo did purchaſe the Manor of D. and after treated with William Beverſham for the purchaſe of the Manor. Taylor gave him a Particular of the Manor, wherein all the parcels of the Manor were expreſſed with their ſeveral Values, but very much over-valued, as was proved. Taylor gave 4300 l. for the Manor, and Beverſham

ſham paid him 4000 l. for it, but the Copyhold Tenement (value 24 l. per Annum) was not in the Particular. Beverſham enjoyed the parcels in the particular ſix Years, but never in that time claimed the Copyhold Tenement, but Taylor enjoyed it; but the Conveyance was of the Manor and the ſaid Parcels with this Clauſe (All which the ſaid Taylor purchaſed of Sheppard) which Clauſe being affirmative reſtrained not the Conveyance, but notwithſtanding the Copyhold paſſed as part of the Manor, and Mr. Beverſham recovered the ſame at Law, and now this Bill was to be relieved againſt the Conveyance for the Copyhold.

Mr. Attorney, Sir John Churchil, Mr. Keck, &c. The ſtate in Law is in the Defendant, who uſed no Fraud to obtain the Conveyance, and by accident without any Act of his, the State of the Copyhold in Law is in him, and conveyed to him by the Plaintiff, who abuſed the Defendant in the particular, greatly over-valuing what he ſold, and the Values ſet down; ſo as there is a Rebutter in Equity to his Demand, not out of a Collateral buſineſs, but in this very buſineſs; and we offer, that if the Plaintiff will make good his particular, we will quit the Copyhold Tenement.

The Lord Keeper. I like not purchaſing by a Particular, it commonly breeds Suits. I find Beverſham abuſed in the particular, but ſince he neither treated for the Tenement nor paid for it, and other ſmall parcels of 20 s. 10 s. &c. value, &c. are in his Particular and Conveyance; this of 25 l. per Annum would not have been omitted if he had meant to purchaſe it, and the Plaintiff never intended to ſell it, which the Clauſe alſo implies, therefore I decree it for the Plaintiff, but he ſhall pay the Rent arrear, and for the future hold it in all reſpects, ſo as Copyhold Eſtate ſubject to Forfeiture and incertain Fine, &c. as it was before the Regrant to him by Copy, &c.

Relief againſt a Purchaſer who paid not for it.

Copyhold.

William Strode *contra* Edward Strode *his Brother.*

Not in Iſſue, yet proved.

THE Bill was for Evidences of the Inheritance which the Plaintiff claimed by deſcent. The Defendant ſet forth a Title to a Leaſe made by their Father to him for ſixty Years, but now at the Hearing ſhewed a Conveyance to him by the Plaintiff himſelf, which was proved in the Books as well as the Leaſe.

The Plaintiffs Council, my ſelf and others allowed the Leaſe, but prayed the Writings touching the Inheritance; for the proof of what is not in Iſſue is idle, the proof muſt be of what is alledged, elſe the Plaintiff is prevented from croſs-examining or alledging to the contrary, as if he had a Reconveyance, Releaſe or the like.

Lord Keeper. I ſhall not decree an Inheritance away againſt what I ſee; and diſmiſs'd the Bill.

Street *contra* the Mercer's Company *and* Moſſe.

Bankrupt.

COats poſſeſſed of a Leaſe for Years contracted with the Committee of the Company for a new Leaſe, and paid part of the Fine, and by Coats's conſent a new Leaſe was made to Moſſe by the Company, and to him executed. Coats was at the time of the Treaty a Bankrupt. The Queſtion was, whether the Commiſſioners could aſſign the Leaſe to the prejudice of Moſſe; and Drake's Caſe was cited.

The Lord Keeper ordered that the Plea and Demurrer be ouſted, and the benefit thereof ſaved till the Hearing; he doubted of the Leaſe; there were other Matters for the benefit of Moſſe alſo in the Plea.

DE

DE
Term. Sanct. Trin.
Anno Regis 26 Car. II.
In
CANCELLARIA.

Breſſenden *contra* Decreets.

LAwrence Owner being indebted by Judgment, and ſeiſed of Lands thereto liable of the value of 300 l. per Ann. died Inteſtate. Charles an Infant, being his Heir, Rebecca his Wife takes Adminiſtration and poſſeſſeth the perſonal Eſtate, and enters as Guardian on the Lands, and received the Profits two Years, and made the Defendant Grace Decreets her Executrix, and charged it; ſhe alſo entred as Guardian, and poſſeſſed the perſonal Eſtate of Lawrence and Rebecca; Charles died, the Plaintiff Breſſenden his Heir was compelled to pay 200 l. on the Judgment; the Defendant took out Adminiſtration of Charles his Eſtate. Heir. Executor.

The Scope of the Plaintiffs Bill was for repayment of the Mony; but the Defendant pleaded her Adminiſtration to Charles, and thereby to be diſcharged of any account of the Eſtate of Charles, and demurred, becauſe no Adminiſtrator de bonis non was Party.

The Lord Keeper's Opinion was, that the Profits taken by the Guardians ſhould be liable to make ſatisfaction to the Plaintiff, but the perſonal Eſtate in Rebecca's hand was liable in the firſt place in caſe of the Heir to which the Adminiſtrator de bonis non is liable; and in that reſpect he held the Bill ill, and gave the Plaintiff leave to amend the Bill in that Point.

Gibbons

Gibbons *contrà* Dawley.

Testament. Diſcretion.

THE Teſtator gave ſeveral Legacies and deviſed that the reſidue ſhould be divided among ſeveral of his Kindred by Name, ſixteen in all, in ſeveral Proportions ſet down by him; but deviſed that the Quantity of the Reſiduary Eſtate ſhould be as his Executor voluntarily and without being thereto compelled by Law ſhould declare. The Executor declared what the Sum of the Reſidue was, and accordingly paid fifteen of thoſe Legatees, but the ſixteenth exhibits a Bill to diſcover the Eſtate, ſuppoſing it more.

Fifteen accept, the ſixteenth ſueth, &c.

After much Debate the Lord Keeper diſallowed the Plea, ſaying, We muſt take heed that we make not ſuch Examples, under which, if Men will be diſhoneſt, they may ſhelter their diſhoneſt dealings; and what if the Executor would make no Declaration, this Court will have an account made.

Blake *contrà* the *Eaſt-India* Company.

Penalty. Eaſt-India Company. Trade.

THE Company employ'd Blake as their chief Agent in India, and by Indenture they took a Covenant of him, that he ſhould not trade for himſelf, nor any other in Salt-Peter, Pepper and divers other Commodities; and Blake covenanted to pay ſeveral Rates for every pound of Salt-Peter ſo traded in contrary to the Covenant 6 d. and ſo of divers other Rates for ſeveral other Commodities, which Sums were ſome four, ſome five, and ſome ſeven times the value of the Commodities. Blake bought the Commodities for himſelf in India to his own uſe; the Company brought debt for 26000 l. to which Sum the Penalties amounted againſt Blake, who brought a Bill to be relieved againſt the Penalty; and notwithſtanding that he proved that it was for the benefit of the Company that he ſo traded, for he bought none but what he ſold to them at a juſt and Market-price, and that if he had not provided ſuch Goods, the Company could not have been ſupplied, and their Ships would have returned ſhort, and what he bought was with his own Mony, when he had no effects of the Company; and although he had given notice of the want to the Company, and he dealt with poor Artificers, who could

could not ſtay, but muſt have advance before-hand, or elſe they would not work at all, but moſt probably would have been dealt with by the Dutch to the loſs of the Company; and it was proved by the Defendants own Witneſſes that ſuch dealings was neceſſary for the ſupply and benefit of the Company; and that the former Agents for the Company, and the Agents for the Dutch uſed ſo to do.

Yet my Lord Keeper diſmiſt the Bill though it was objected that this Covenant was a greater Penalty than a Bond of double the value; ſo it was but an artificial dividing of a Penalty of a Bond.

Lord Keeper. A Leaſe is made rendring Rent, and if a Meadow be plowed to pay 5 l. Rent per Acre, is this relievable? I ſee not how the Company can ſubſiſt unleſs ſuch Trade be reſtrained. Diſmiſs the Bill.

Tyas *contra* Talbot *and others.*

Guardian. Contempt.

THE Plaintiff, was Guardian in Soccage to the Infant the other Defendant, who had ſuſtained divers Suits for the Infant, and paid debts to which he was liable, and aſſigned the Guardianſhip to Talbot, and decreed an Account; his Diſburſements and payment of debts to be allowed, and what due to be paid out of the Infants Eſtate in Talbot's hands by Talbot. The Maſter certifies 140 l. due, which was decreed, and Talbot in contempt for Non-payment, appeared, was examined, and ſet forth on Examination, that the other Defendant, the Infant, died two days before the Decree was inrolled, and the Cauſe ſet down to be heard: But the Contempt affirmed; for the death of the Infant he had not proved; but there could be no Examination thereto; but the main Reaſon was becauſe the Lord Keeper took it that the Decree had fixed the payment on the Defendant Talbot, ſhe having confeſſed Aſſets of the Infant's Eſtate in her hands by her Anſwer, and therefore what 'ere became of the Infant or his Eſtate, ſhe is liable.

DE

DE
Term. Sanct. Mich
Anno Regis 26 Car. II.
In
CANCELLARIA.

Parker *contra* Dee.

Executor. Aſſets.

CHarles Everard a Banker owed the Plaintiff 700 l. and was alſo indebted to divers other perſons by Book-debts, &c. without Seal, and by ſeveral Judgments to others and to B. by Recognizance in Chancery to perform the Order of the Court, and that being for Money there was a Judgment thereon, ſo the Recognizance and Judgment was for the ſame debt in effect, the Defendant being Executor of Everard. Trin. the Plaintiff ſued the Defendant in Communi Banco for his debt. The Defendant pleaded all the Judgments which were on penal Bonds, and pleaded alſo the ſaid Recognizance, ultra quod, &c. he had no Aſſets; the Plaintiff ſued here April 1668. to diſcover the Truth of the Plea, and Debts therein ſet forth and the Aſſets.

Thereupon the Defendant obtained an Order that the Plaintiff ſhould make Election whether he would proceed in this Court or at Law. The Plaintiff elected to proceed here. The Defendant uſed very many delays by Petition and Contempts to put off the Hearing in this Court, and paid divers of the Debts which were of the ſame nature with the Plaintiffs debts without Specialty, pending the Suit in this Court. The Cauſe being heard it was decreed to go to an account, wherein the Executor was

was to be allowed all juſt debts due by Record or Specialty, and all debts without Specialty, which were paid before the Plaintiffs Bill to be allowed; but not ſuch as were paid voluntarily, pending the Suit, or whereon voluntary confeſſed Judgment were for debts without Specialty.

The Defendant got the Maſter of the Rolls, who heard the Cauſe, to Rehear it, and uſed other delays, and at laſt appealed to the late Lord Chancellor, who made a Decree therein; and not content therewith, appealed to the new Lord Keeper. A Caſe had been ſtated, and the Cauſe being now heard by the Lord Keeper, the Defendant preſſed for diſmiſſion, becauſe the Plaintiff had the effect of his Suit to make a diſcovery, and it was his Ignorance to chuſe to be diſmiſt before ſuch time as he had examined his Witneſſes.

Lord Keeper, &c. There have been ſix Hearings in this Caſe, three on Interlocutory Orders, and three on the Merits; as for diſmiſſion to Law, becauſe the Plaintiff hath diſcovery here; when this Court can determine the Matter that ſhall not be an Hand-maid to other Courts, nor beget a Suit to be ended elſewhere; the Defendant hath uſed great ſhifting and ſhewed great Partiality; his Plea at Law was falſe and deceitful, for it appears he compounded debts at ſmaller value, and pleaded the whole debt as due; he compounded a debt of 300 l. for a Jewel 200 l. value, and in truth but worth 100 l. and paid debts of the ſame nature as the Plaintiffs, pending this Suit, without compulſion by Suit, which he ought not to have done; for after the Suit begun the Executor may not excuſe himſelf by any voluntary payments; he may uſe legal delays, as Imparlance and Eſſoins, &c. to prefer one Creditor before another, but he may not do it by falſe pleading of what lieth in his own knowledge; otherwiſe, if the Falſity lie not in his knowledge, as Non eſt factum Teſtatoris, in this Caſe the Plea was falſe and fraudulent, and therefore the Plaintiff here ſhall have the ſame advantage as if the ſame Plea were found falſe by Verdict at Law, and ſhall have all the ſame conſequences here as follow on a falſe Plea at Law to all intents. And all Judgments voluntarily confeſt after his falſe Plea go for nothing, and decreed accordingly, account of Aſſets with their directions; but Copyhold are no Aſſets, and the Lands deviſed or conveyed to pay debts muſt be in proportion equally of debts by Bond or otherwiſe.

Rothwell *contra Sir* Charles Huſſey, *Dame* Huſſey, *&c.* 20 Novemb. 1674.

Leaſe Parol. Truſt in four, three Leaſe.

SIR Charles Huſſey, Father of the Defendant Charles, &c. ſeized in Fee, made his Will, and deviſed the Lands in queſtion to Sir Richard Markham, B. B. W. B. and White for one and thirty years, in truſt to pay his debts and portions to his Daughters, and after for his Heir, and died: The Will is proved in common Form, and Sir Richard Markham and two others of the Truſtees without White, the fourth Truſtee, by Writing under their hands authorize Roſe, who was Sir Charles Huſſey's Bailiff at the time of his death, to continue and to receive the Rents, manage and let the Lands, who by Parol let them to one Bonnor for eleven Years; Bonnor aſſigned to the Plaintiff, who entred and incloſed, &c. There is an Action at Law brought by the Heir, and an Ejectment ſealed, and Judgment in both Actions. The Plaintiffs Bill was to eſtabliſh his poſſeſſion, and to be relieved againſt the Actions; the Equity was becauſe the Lady Huſſey detained and concealed the Will, ſo as the Plaintiff could not make his defence at Law by the Will, being of Lands, ſo as the Probate was not Evidence; and in truth the Lady had the Will, and confeſſed ſhe had a Paper ſubſcribed by Sir Charles Huſſey, but knew not that it was her Husband's Will, and ſhe did now produce it in Court at Hearing; yet becauſe the Plaintiffs Title was but a Leaſe Parol, the Lord Keeper declared, he would never give Relief. And ſecondly, for that the Leaſe was a breach of Truſt being by authority of three only, and he would not give Relief to a Leaſe made in breach of Truſt, therefore he diſmiſſed the Bill, though it was objected, that the Verdicts were on the Heirs Title, which was contrary to the Truſt.

Woodward

Woodward *contra* King.

Service of an Injunction.

WOodward had an Injunction for keeping, &c. poſſeſſion, which in Truth was iſſued under Seal, but no Order or Affidavit to warrant it, but Order and Affidavit were after, viz. in December, though Injunction was in December. One Urry delivered Mr. King a Copy of the Injunction, and as he ſwore, ſhewed him the Writ under Seal. King deſired Urry to ſhew him the Writ to examine the Writ and Copy, to ſee how far he was concern'd in it, which Urry denied, and King thereupon delivered back the Copy, but diſturbed Woodward's Poſſeſſion. King being proſecuted for the contempt, it appeared ſufficiently, that there was a diſturbance and contempt; if the Writ was well ſerved it was acknowledged to be a good Service prima facie; but when ſight of the Original was deſired it ought to be ſhewn, as in Mackalley's Caſe, A Bailiff or Sheriff makes an Arreſt, he need not ſhew the Capias; but if the Party requires to ſee it, he muſt ſhew it, or the Party is not bound to obey it; and if the Officer will not ſhew the Writ the Party may reſiſt the Bailiff, and is not in contempt for his reſiſtance; but though it be in caſe of Murder enſuing, is excuſable, and much more is the Defendant excuſable where a private perſon, who is no Officer, ſerves a Proceſs on him, if he refuſeth to ſhew it, when he is requeſted to ſhew his Warrant, viz. the Writ, elſe 'tis he who ſerves the Writ is diſobey'd rather than the Writ, and otherwiſe the Inconvenience may be great; for if an Injunction be not granted, but one ſhews another Writ and delivers the Paper, and tells the perſon that it is a true Copy of an Injunction to deliver poſſeſſion, or to deliver up a Bond, or other Writings, whereas there is no ſuch Injunction; if he will not ſhew it, however I muſt believe, and either fall into contempt or loſe my poſſeſſion, or deliver up my Writings to I know not whom; and what remedy then? For though in eventu rei, if I diſobey I ſhall be free, becauſe there is no ground of the Writ, yet I am in danger and in doubt till I can examine it; and ſuppoſe it be true, that ſuch Injunction was, yet poſſibly I knew not of it, and then it were very hard that the bare affirmation of a Stranger, who ſerved the Writ, which may be is unknown to me,

Cake's Reports.

Lord *Keeper.*

The Party below ſhall obey.

If he will diſpute, he ſhall do it here.

me, (and they are commonly mean Persons who serve Process) shall put me on a Dilemma, either of Contempt, or loss of Possession, or the like.

But the Lord Keeper declared the Service sufficient to ground the Contempt; for if he should deliver it to one Party, if he kept it, how shall the rest be served with it?

His Lordship was going to the Council, else it might have been replied, that it is one thing to shew it to be examined, and another to deliver it; he was not desired to deliver it, but to shew it to be examined. 2d. Such Mischief may be prevented if fear be of such Miscarriage by taking a Duplicate.

The Lord Keeper declared, that notwithstanding the Irregularity of issuing the Injunction, it ought to be obeyed; and though the disturbance which was, was by a Justice of Peace on view of Detainer of Possession with force, and there was a Detainer with force, yet that should not excuse it, for then the Process of this Court should be subject to a Justice of the Peace.

Duckenfield *contra* Whitchcott.

Rent not abated by Loss or Eviction of Profits, &c. if no Covenant.

SIR Jeremy Whichcott, Warden of the Fleet, granted the same with some Exceptions, to the Plaintiff for 1000 l. in hand, 1000 l. per Annum, and 200 Ounces of Plate Rent: His Agent Gibbon gave a Particular of the Chamber Rents to the Plaintiff, to induce the Plaintiff to the Bargain: Afterwards on Complaint of the Prisoners, the Judges of the Common-Pleas reduced the Rents of the Chambers which the Prisoners were to pay, so as they came to near a quarter less in value. The Plaintiff thereon sought to be relieved, for ths Order is compulsary, and in nature of an Eviction; for though the thing remain, the Profits which answer the Rent are taken away: But in regard there was no Covenant in the Assignment for the upholding the Values, or that they were such:

The Lord Keeper conceived it as other Cases of Purchase, where it seldom happens, but Things are overvalued. He dismist the Bill.

Other Matters were debated, but Whichcott offered in his Answer to pay back all on mutual account, &c. if the Plaintiff would have his Bargain. The Plaintiff was put to his Election to take the Offer, or be dismist.

Lingon

Lingon *contra* Foley.

DEcreed that a Deviſe of Lands to Truſtees on Truſt out of the Rents and Profits, to pay Debts and Legacies; the Truſtees may ſell the Land it ſelf: This Point roſe on Sir Henry Lingon's Will againſt Foley, who purchaſed and had notice of the Will. Land ſold where Legacy, out of Profits.

2. Henry, Son of Sir Henry Lingon, deviſed Lands to be ſold for payment of Debts, the whole Eſtate being incumbred: The Truſtees ſold Stoke, part of the Lands, for 6000 l. and the Truſtees aſſigned to him ſeveral of the Incumbrances bought off with his Mony, and allowed good, tho' the Eſtate not wholly freed thereby. Incumbrances.

DE

Term. Sanct. Trin.

Anno Regis 27 Car. II.

In

CANCELLARIA.

Lutton *contra* Rodd. 21 June 1675.

Mony refused loseth no Damages.

A Deed in nature of a Mortgage and Covenant to re-convey on payment: The Mony was tendred at the day and place, and refused: Decreed the Mony without Interest from the time of the Tender, and to re-convey, though that the Plaintiff ought to make Oath that the Mony was kept, and no profit made of it.

DE
Term. Sanct. Mich.
Anno Regis 27 Car. II.
In
CANCELLARIA.

Miller *contra* Stephens.

SIR Lewis Pollard made a Leaſe for Years to Sir John Northcot and others for payment of his Debts, and died: The Reverſion deſcended to Sir Hugh Pollard: The Truſtees, and Sir Hugh, aſſigns the Term to Stephens by way of Truſt to pay Stephens 750 l. Sir Hugh Pollard confeſſeth Judgment to Miller; Stephens receives the Profits, and pays them to Sir Hugh, to the value of 800 l. Stephens having no notice of the Judgment, nor was there any Extent on the Judgment. Truſt.

Decreed by the Lord Keeper; That he account, and the 800 l. not to be allowed otherwiſe than as to go in ſatisfaction of his Debt, viz. Stephen's Debt. Satisfaction.

Anonymus. 5 November, 1685.

LEſſee for Years ſubject to a Truſt, deviſeth Reſid' bonor' the Eſtate would but pay the Debts if all ſold; he payeth the Debts, and reneweth the Leaſe for a further Term: It being a Church-Leaſe, and offered to account if any Profits would ariſe out of the old Term. Leaſe renewed. Executor.

But

But Sir John King preſt that he could not be charged further; for if he pay the Debts to the value, then the Property is altered, and veſted in him, in his own Right.

Lord Keeper. The Executor ſhall make no advantage to himſelf, and ſhall account for the new Leaſe as well as for the old: Did the Executor acquaint the Church with his Caſe, and did he declare that he would renew, and take it for the time of the old Term, to the benefit of the Creditors and Executorſhip, and the reſt for himſelf? By the French Law no Church-man can make a Leaſe to any but the old Tenant, unleſs he firſt be refuſed by the old Tenant.

Lord Keeper decreed accordingly.

Anonymus. *The ſame Day.*

Purchaſer protected.

A Purchaſer of Land incumbred with two Statutes, purchaſeth in a pretedent Statute, having no notice of the ſecond Statute.

Lord Keeper. If he had no notice of the ſecond Statute becauſe he was dipt in the Purchaſe, he ſhall defend himſelf by the firſt Statute, whether the ſame were paid off or no, if he can at Law do it, Equity ſhall not hurt him.

Jefferſon *and* Dawſon, *on* Plea, *&c.*

Iſta reſpons' capta, where it was a Plea.

AN Anſwer and Plea taken by Commiſſion, was returned Iſta reſpons' capta fuit per Sacrament', &c. So the Plea was not an Oath, and therefore rejected, but without Coſts, becauſe the Lord Keeper apprehended it as the Fault or Neglect of the Commiſſioners who took it, rather than of the Defendant.

Witneſs demurr.

A Witneſs demurred to an Interrogatory, becauſe he claimed Intereſt in the Land, and diſallowed becauſe ſhe did not ſwear to the Intereſt, nor what Intereſt ſhe claimed.

Duke

Duke *contra* Duke. 1675.

THE Bill ſuppoſed a Settlement on the Plaintiff in Remainder after the death of Elizabeth his former wife, and on certain Conditions depending on that Eſtate of Elizabeth, and to examine Witneſſes to thoſe points: The Defendant ſets forth a Settlement ſubſequent to the Time, pretended for the firſt Settlement on a ſecond Marriage, and Iſſue of that Marriage had fifteen Years ſince; and the Plea allowed; for it was alledged at Bar, that in truth this Bill was but an Artifice to examine the ſecond Marriage, which whether it were not in the life of Elizabeth the firſt Wife, and ſo to Baſtardize the ſecond Children. Settlement.

Lord Keeper allowed the Plea.

Warman *contra* Seaman, &c.

NAthaniel Burton ſettled the Lands in queſtion for 100 Years, to William Warman and Julian Ux. for 100 Years. Julian ſurvived, and granted the Term to Penroſe and Thomas Warman, on truſt, in theſe words: That the ſaid Penroſe and Thomas Warman, their Executors, &c. ſhould ſuffer Julian to receive the Profits thereof during her life, and for ſo much of the ſaid Term as ſhould be unexpired at the time of her death upon like Truſt and Confidence that They, their Executors and Aſſigns, or the Survivor of them, will and ſhall, upon any reaſonable Requeſt, aſſign All, and all their Intereſt and Right in the Premiſſes, to the Iſſue of the Body of the ſaid Julian; and for want of ſuch Iſſue upon like Requeſt, They, their Executors, Adminiſtrators and Aſſigns, ſhall aſſign all their Intereſt then to come to George Warman and William Warman, Brothers of the ſaid Julian. 100 Tail. 100 Truſt.

Julian had Iſſue Eleanor, and died: Eleanor died without Iſſue; the Plaintiffs Title was under the Brothers, the Defendant's under the Adminiſtrator of Eleanor.

At the firſt hearing the Lord Keeper decreed for the Plaintiff, but on a ſecond hearing obtained by Petition he referred the Matter in Law to Juſtice Rainsford, who certified his Opinion for the Defendant, having heard Councel on both ſides.

And now, viz. the 16th of Decemb. 1675. gave his Judgment accordingly, and diſmiſt the Bill.

Lord Keeper. At the former hearing, I looked on Seaman as one who had, by occaſion of being Sollicitor in a former Cauſe, thruſt himſelf into the Title, which made me hold him to all ſtrictneſs; but on the ſecond hearing, I find him a real Purchaſer, and at firſt as though Poſſeſſion had gone againſt him all along, which appears otherwiſe; ſo thoſe two Circumſtances laid out of the Cauſe, it reſteth on the matter in Law, in which alſo my Opinion was againſt the Defendant, for theſe Reaſons:

1ſt. That the Limitation of the Iſſue of Julian is to be taken as to a Purchaſer, and conſequently carrieth but an Eſtate for life to the Iſſue, and the Conveyance or Aſſignment to be made to the Iſſue, though for the Term to be interpreted for the life of the Iſſue, as in Wild's Caſe, 6. Co. and otherwiſe all the Iſſues muſt have taken jointly, and not ſucceſſively: But referring it, the Judge hath certified his Opinion to the contrary, and not only that it was his Opinion, but as he informed me, that it was the Opinion of all the Judges with whom he had conferred, and gave Reaſons for it, which I will be made part of the Order, and am content to err in ſuch Company.

Reaſ. 1. The whole Term was to be aſſigned to Julian, and then there can be nothing left for the Brothers; but this Reaſon is Petitio principii.

Iſſue. Expoſition. And I am not ſo much moved therewith as was ſaid by the Defendant's Counſel, viz. It was a contingent Limitation, if I have Iſſue, the whole Term to my Iſſue; if no Iſſue, to my Brothers.

Reaſ. 2. That the Remainder to the Brothers after a Limitation to the Iſſue of Julian, is a void Limitation; for if it be taken as a Remainder to the Brothers, then they may not take it till all the Iſſue of Julian, and their Iſſues alſo be ſpent: Iſſue includes all, and is Nomen collectivum, and an Eſtate for life of a Term deviſed to A. and after to the Iſſue of A. and for want of Iſſue of A. to B. It was adjudged a good Remainder to B. in the King's Bench lately, but reverſed in Camera Scacarii, on Error brought, and a difference taken between ſuch Limitation to Children and to the Iſſue; and cited Pears and Reeves's Caſe in point.

Strickland

Strickland *Vid. contra* Coker.

Coker was ſeized for Lives of the Prebend of Alton, being a Church-Leaſe, in Truſt for Robert Strickland an Infant, on a Treaty of a Marriage to be had between the Infant and the Plaintiff, and 1000 l. Portion to the Infant's uſe.

Guardian of an Infant bound in his own Eſtate by Covenant of the Infant: The Guardian being Party to the Indenture. Infant. Agreement.

An Indenture was made with the conſent of Coker Guardian, or pretended Guardian; whereby the Infant covenants that the Leaſe ſhould be ſurrendred, and a new Leaſe taken, and the Wife's life therein for her Jointure: But though Coker ſealed the Indenture, yet there was no Covenant or Agreement on his part, but was made Party only to ſhew his conſent. The Marriage was had, the Portion paid, the Huſband died, the Leaſe ſurrendred, and the Wife's life put in.

The Widow ſued Coker to aſſign for her life, and decreed accordingly; and Coker pretending the Truſt was in the firſt place to pay Debts to him, it was decreed the Debts ſhould be paid out of the Truſt after the Widow's death.

The Decree was affirmed on a Re-hearing.

DE
Term. Sanct. Hill.
Anno Regis 27 & 28 Car. II.
In
CANCELLARIA.

Taylor *contra* Dabar. 1675.

Covenant to make further Assurance. The Land evicted. Covenantee purchaseth it

A Purchaser of the Crown-Lands in the time of the late War, sells part to the Plaintiff, and covenants to make further Assurances: He on the King's Restitution for 300 l. had a Lease for years made to him under the King's Title.

Decree was he should assign his Term in the part he sold.

Sir Hugh Windham *and Sir* Robert Atkins *Plaintiffs*; Henry *Lord* Richardson, Bayly *and others*, *Defendants*.

The Case was.

A. mortgageeth to *B.* and *W.* to *B.* and after *A.* seised in Fee of the Manor of *Ashwood*, acknowledges a Statute to *B.* and after mortgages the same Manor to *C.* and after Mortgages part of the said Manor and other Lands, to *D.* *D.* the second Mortgagee purchaseth in *B*'s Stat. The first Mortgagee shall not be admitted to set aside the Extent on payment of what is due on the Stat. without payment of what is due on the second Mortgage also.

THomas Lord Richardson seised in Fee 1663. acknowledged a Statute of 1000 l. to J. S. and the 20th of June 1665. mortgaged the Manor of Ashwood in the County of Norfolk to the Plaintiffs, for 2000 l. and the 22d of June 1665. two days after mortgaged part of the same, and other Lands, (as was at first apprehended) to the Defendant B. The Mortgagor dies: Henry is Heir. Bayly the second Mortgagee agrees with Marshall another Defendant, Exe-

cutor

cutor of the Conizee, to put the Statute in Execution at his Costs, and to pay Marshall the Debt due on the Statute, after such time as the Statute should be extended, and an Assignment made thereof by Marshall to Bayly; the Statute is extended in August 1672.

The Plaintiffs Bill is, that paying the debt on the Statute, it may be set aside and assigned to them, and a Decree against Richardson to pay, &c. or to be fore-closed of Redemption. Bayly in his Answer acknowledges the Mony on the Statute, viz. 1200 l. not yet paid, but offers to pay it on assigning of the Extent.

The question is, whether the Plaintiffs shall be admitted to set aside the Extent on payment of the 1200 l. without payment of the 2000 l. due on the second Mortgage, till the Statute is satisfied, according to the extended value, and not according to the Justice of the Debt in Equity?

Object. 1. The second Mortgagees are in such case protected against a former Mortgage only on this reason, Because they are intituled to Equity by laying out their Mony truly on their Mortgage, and are intituled in Law by purchasing in the former Incumbrance; so that having Title in Law and Equity, he that hath only a Title in Equity shall not prevail against Law and Equity: But Bayly hath no Title in Law; for though the Statute be extended, yet it is not assigned to him, and he hath not yet paid the 1200 l. and the Plaintiffs are ready to discharge him of that: And so offer.

Object. 2. The Defendant hath in his Mortgage made after the Plaintiffs Mortgage, not all the Lands mortgaged before to the Plaintiffs, but only part thereof, and the Statute covereth the whole: Now if the Defendant may by the Purchase of the Statute thereby defend himself as to what is in his Mortgage, yet he may not defend himself against the Plaintiffs, as to such Lands as are not in his Mortgage: As if A. acknowledge a Statute to B. A. being seised of the Manors of E. and C. and after A. mortgageth E. to one, and C. to another; if E. purchase in the Statute, he shall secure himself against all Men so far as his own debt is, and also as to one Mortgage but not to both.

The Lord Chancellor was strongly of Opinion against the Plaintiffs in both points, but some question of Fact arising, viz. Whether any of the Lands mortgaged to the Plaintiffs were in the second Mortgage or no? The Cause was put off on Propositions. Note,

Witneſs. Note, If a Man be named Defendant who is proper to be a Witneſs in the Cauſe, the Plaintiff muſt by Order ſtrike out his name before Anſwer, but after Anſwer he may by Order examine him as a Witneſs, though his name be not ſtruck out of the Bill, if he be otherwiſe competent, as if he diſclaims, or have no Intereſt, or only as a Truſtee.

Cartwright *contra* Pettus. 1675. 28 Car. 2.

Ireland. CArtwright exhibits a Bill againſt Pettus: They were Joint-Tenants of Lands in Ireland; the Plaintiff prays an account of the Profits, and a Partition of the Lands.

12 Feb. 1675. The Lord Chancellor declared, that as to the Profits the Bill was good, the Perſon being in England, for they are in the Perſonalty; but as to the Partition, which was in the Realty, he could not here proceed, for he could not award a Commiſſion into Ireland: And the Bill for a Partition was in the nature of a Writ of Partition at the Common Law, which lieth not in England for Lands in Ireland. 21

DE
Termino Paſchæ
Anno Regis 28 Car. II.
In
CANCELLARIA.

Charles Price *Plaintiff, and* Elizabeth Morgan *and* Herbert Evans *Defendants.*

Giles Morgan, on the Marriage of Cicely his Daughter to Thomas Price, Father of the Plaintiff, agreed to pay to William Price, Father of Thomas, 1000 Marks for her Portion, and William Price the Grandfather of the Plaintiff was to ſettle Lands on Thomas and Cicely. The Settlement was made, and all the Portion paid but 118 l. 3 s. 2 d. which Giles Morgan did keep in his hands, becauſe the Jointure-land of Cicely was incumbred. William Price, to whom the 118 l. was due, made his Will, and thereby declared that 118 l. ſhould be paid to Henry his younger Son in truſt to take off the Incumbrances on the Lands, and made Henry and Ann his Executors, and died Anno 1634.

Mich.

Mich. 1673. Thomas finding the Land not diſcharged, exhibited his Bill againſt Giles Morgan his Father-in-law, who owed the 118 l. and Henry who was to receive it; and therewith to clear the Eſtate, that the 118 l. might be paid, and the Land diſcharged: To his Bill Giles in his Anſwer did confeſs the 118 l. to be unpaid, and that he was ready to pay it on clearing the Incumbrances; the Cauſe went on to publication, but before hearing Giles died, and made W. Morgan his Executor: But yet Thomas brought on the Cauſe to hearing, againſt Henry and William Morgan, Executor of Giles preſent in Court, (as the Order at hearing recites) that William Morgan conſented to pay the 118 l.

Whereupon it was decreed the 12th of October, 15 Car. That Sir Edward Salter take the Account what was unpaid of the Portion, and a courſe directed for taking off the Incumbrance; and if William Morgan will keep the Mony in his hands any longer, he is to pay Intereſt.

A Report was made, and a Decree drawn up.

Thomas Price dieth, and Henry Price dieth; Charles Price paid the Incumbrance out of his own Eſtate, and takes Adminiſtration of Henry Price's Eſtate and of William's. William Morgan, Executor of Giles, deviſeth by his Will ſeveral Lands to his Executrix Elizabeth, and to Herbert Evans Defendants, to be ſold to pay his Debts: The Plaintiff prays Satisfaction out of the perſonal Eſtate of Giles and William Morgan, and out of the Lands.

Debts. Truſts. Executors. Waſte, viz. Devaſtavit.

1ſt. Much debate aroſe, whether the Bill was a Bill of Revivor, or an Original; for after ſo long time the Lord Chancellor on hearing the Cauſe, it being then repreſented as a Revivor, ordered a Diſmiſſion: But on ſecond hearing it appeared to be an Original Bill, and the Decree ſet forth but as Evidence.

2dly. But diſmiſs Herbert Evans, who was no Executor, but Deviſee of Lands to ſell to pay Debts; for his Lordſhip declared that ſuch Proviſion to pay Debts, did not extend to debts of the firſt Teſtator Giles, nor to make Satisfaction out of the Lands, if William Morgan, Executor of Giles, had waſted the Eſtate perſonal of Giles to the value of the debt, and ſo it became the debt of William in Equity, and he while he lived liable in Equity to make Satisfaction to the value of ſo much as he had waſted, and in conſequence

the

the Lands deviſed to be ſold for payment of debts ought to be liable.

Lord Chancellor. Although by the Common Law, when the Executor wafts, his Executor ſhall not be liable, becauſe it is a perſonal wrong; it is otherwiſe here, and the Common Law will come to it at laſt; and therefore whatever Eſtate of Gyles is come to Elizabeth, or to the hands of William, which William her Teſtator waſted the perſonal Eſtate of William in the hands of his Executrix ſhall anſwer.

But the charge or duty which fell upon William by waſting the Eſtate of Gyles is not ſuch a debt as is within his will, when he willeth his Lands to be ſold for payment of his debts; for it is not properly a debt by Contract, but a debt or duty ariſing ex maleficio, which I hold not within the meaning of his will. Therefore diſmiſs the Bill as to Herbert, and let the other Defendant Executrix account according to theſe directions. Moſely and Maynard's Caſe was cited at the Bar.

Anonymus.

IF a Suit be in Chancery for a debt for Rent by Leaſe Parol or ſimple Contract, and beginneth within time of Limitation, and be diſmiſt after the time of Limitation, the Court will not order the Defendant to take no advantage of the Statute of Limitation, See Boſcowen and Boſcowen's Caſe. But if in ſuch Suit the Party be ſtayed by Act of the Court, as by Injunction, &c. its otherwiſe; for the Act of the Court ſhall do no prejudice, as in Caſe of Demurrers at Common Law. Limitation. *Stat.* 21 *Jac.*

Inglet *and* Inglet.

WItneſſes examined to the damage on breach of Covenant not re-examined on the ſame Interrogatory, although ſpeaking in the firſt uncertainly. Re-Examination.

The Eaſt-India *Company contra* Mainſton, *to have an Account of his Imployment, and charged him with divers Deceipts and Omiſſions in his Books of Accounts, which he had ſent and delivered: To which the Plaintiff pleaded. The Caſe on the Plea was,* viz.

Eaſt-India Company.

THE Company had one chief Factory at Bantam, and other inferior Factories, as at Jambee and other places in which the Factory, viz. their Agent and Council there had power to place other Factors and Chiefs, and to inſpect their Accounts, place and diſplace them. Bantam Factory and Council placed the Defendant chief Factor at Jambee, who acts in that Service ſix Years, and then gave his Account to the Factory at Jambee, which was there allowed, and then was again re-examined by the Chief and Council at Bantam, and ſent to the Company here: And here the Company drew many Exceptions to the Defendant's Accounts in Writing, and ſent them to the Factory at Bantam to inſpect and examine, which they did; and on full peruſal and examination thereof they allowed the Accounts and diſallowed the Exceptions, and made a ballance of Mony due to the Defendant, and charged the Company here with Bills of Exchange to pay it. The Defendant returned into England; the Company paid part of the Bills of Exchange, and delivered to the Defendant divers Goods of the Defendants, as Pepper, &c. but now ſue for an Account, ſuggeſting the ſame Errors and Deceipts formerly taken and examined, and diſallowed: To which the Defendant pleaded the Matter aforeſaid, and that reſted quiet till he preſſed for the reſidue of his Mony due on the Account and Bill of Exchange, and farther that divers of his Vouchers were forceably taken from him by the King of Jambee a Heathen; and his Books and many of his Vouchers delivered up to the Factory at Bantam, without which he could not Account; but the Company now offered that he ſhould have the Uſe of his Books.

The

The Lord Chancellor diſallowed the Plea, and that the Defendant ſhould anſwer; for he ſaid that this differed from other Caſes, for it was a National Cauſe and Concernment, and nothing ſhould diſcharge the Factors in India but a Releaſe or diſcharge from the Company its ſelf, elſe their Agents may by mutual connivance ruine the Company.

Another Point was the Company impoſed a great Value on Commodities, prohibited by their Agents to be traded in, viz. five, ſix, or ſeven times the value; yet the Defendant ruled to anſwer though it were a Penalty.

DE
Term. Sanct. Mich.
Anno Regis 28 Car. II.
In
CANCELLARIA.

Noy *contra* Ellis.

Mortgagees. Heir. Administrators.

BOsistow mortgaged Lands to Joseph Noy and his heirs; the Condition was to pay the Mony at a day to the Mortgagee his heirs, Executors, Administrators or Assigns; the Mony was not paid, the Mortgagee entred and died; three of the Defendants, as his heirs entred; Julian, Wife of the Mortgagee, takes Administration, then brings a Writ of Dower against the heirs; and others bring Actions of debt against the heirs on Bonds, wherein the Mortgagee bound him and his heirs; the Wife exhibits a Bill against the heirs and the Mortgageor, that the Mortgageor may redeem, and the heirs reconvey to the Mortgageor, and that she as Administratrix may receive the Mony; and decreed accordingly.

The Objections against the Decree were, viz.

1. The Condition was to pay to the heirs, Executors, &c.

2. The Mortgagee had entred, and by his Act, as far as in him lay, made it part of the real Estate.

3. The Plaintiff by bringing a Writ of Dower had so done also.

4. There were no Debts, but Assets sufficient with Overplus.

5. Nec

5. Neither were any Children or Portions to be paid.

6. The Law gave the Eſtate to the Heirs, Siſters of the Mortgagee, and the Adminiſtratrix came not in by the Act or diſpoſition of the Mortgagee; and it were hard to take away a legal Eſtate from the Heir to give it to an Adminiſtratrix, who ought to be leſs favoured than the Heir, who always muſt be of the Blood. An Adminiſtration may be to a Stranger, and whether he be or not, his Title is the ſame only by the Ordinary.

The Precedent between Tilly and Egerton and others was cited.

Notwithſtanding the Lord Chancellor decreed ut ſupra. He ſaid he had conſidered all the Precedents, and held no difference where payment was to be to the Heirs and Executors, &c. or to the Executors only: But in Caſe the Mony had been paid at the day of payment to the Heir, there it was well to the Heir; but if it were not at the day, then it ſhould return to the perſonal Eſtate, for it came from thence, and ſhould return thither again, and ſaid, it was needful that Point ſhould be ſettled; and no matter what the Law is, ſo it be certain, as Chief Baron Walter ſaid; and concluded all Mortgages pertain to the perſonal Eſtate though made in Fee.

Culpepper *and* Auſtin. Auſtin *contra* Culpepper.

SIR Thomas Culpepper the Father, the 29th of February, 1642. by his Will in writing deviſed, That if all his debts might be paid out of his perſonal Eſtate, or out of the Rents and Profits of his Lands, then Henry Culpepper his Brother, and Sir Nicholas Criſp, who he recited to be eſtated in his Lands in Truſt ſhould convey his Lands to the Plaintiff, his Son, at his age of one and twenty Years, and receive the Profits in the mean time, and made them Executors and died, the Plaintiff, his Son and Heir, being an Infant.

And ſuppoſing the Executors had raiſed ſufficient to pay the debts. 1655. he exhibited his Bill againſt the Executors to have the Lands, being one and twenty Years of Age. This Bill was not proſecuted divers Years, and was grounded only on the Will, which in Truth was revoked by a Deed made by Sir Thomas Culpepper in March following in Truſt, whereby the Lands were conveyed to

them

them and their Heirs to ſell to pay his debts; for by the Will the Executors had only an Authority to ſell, and that of two parts; by the Deed they have the Eſtate not only of the two parts, but of the whole; and there were other variances in the truſt limited in the Will and Deed.

In 1660. the Plaintiff Culpepper exhibited a ſecond Bill againſt Henry Culpepper, the Executor, and others to the ſame effect.

And a third Bill againſt Henry Culpepper the Executor, and Sir Robert Auſtin, to the ſame purpoſe; but herein charged not only the ſaid Will, but that the Defendant pretending to the Lands ſome Title by ſome other Deed or Will had entred, &c. and prayed an Account.

Sir Robert Auſtin by Leaſe and Releaſe dated the 16, 17 July, 1661. by advice of Serjeant Broom on peruſal of the Deed made the 9th of March, 1642. after the Will (but it ſeems he was not acquainted with the Will) for a full conſideration, viz. 1120 l. (actually paid, 900 l. and the reſt then ſecured) did purchaſe the Lands in queſtion being not worth above 55 l. per Annum; at this time Sir Robert Auſtin was named Party in the laſt Bill; no Proceſs taken out againſt him till November, 1661.

Sir Robert Auſtin anſwered and died, Sir J. Auſtin, his Son and Heir, exhibits his Bill for Relief, ſuppoſing Colluſion between the Uncle of the ſaid Heir and him; and in truth the Anſwer of the Uncle to the laſt Bill came in the 17th day of June, 1661. the ſame day wherein Sir Robert Auſtin purchaſed, and paid his Money; and the ſerving Proceſs on Sir Robert Auſtin in November after; and it was proved that the Plaintiff offered Henry Culpepper Son of Henry, the Uncle, that he would quit his Father, Henry Culpepper, of all Accounts, and releaſe him if ſo be he would comply with him in the Accounts; for he ſaid he intended to lay the burden upon Auſtin, and if he would ſo do he ſhould not want for 200 Angels; but the ſame witneſs on the other part ſwore he did not accept thereof, but faithfully managed the Account, Culpepper's Bill being brought to an Hearing againſt Auſtin.

The Lord Chancellor Aſhly heard that Cauſe, and on hearing ſeveral Orders made in Auſtin's Cauſe, directed an Account with ſpecial directions (inter alia) an Account made by the Uncle in preſence of the Plaintiff to be conſidered.

Now

Now Auſtin's Cauſe coming to be heard by the Lord Finch many things were moved, and that this Cauſe could not receive any final determination till the Accounts before the Maſter were ſettled, which depended by ſeveral Exceptions taken by Auſtin, whoſe Bill was not brought on by him, but by the Defendant Culpepper, Plaintiff in the other Cauſe.

There were divers things agreed and reſolved: 1. That by the Truſt in the Will to ſell, the Purchaſer did purchaſe at his own peril, if the perſonal Eſtate and Profits of the Land received were ſufficient, and afterward became inſufficient. Truſt to ſell.

2. But if the Truſt were as in the Deed, the Purchaſer was ſafe; for the Vendor is liable, not the Purchaſer. If the Conveyance be to ſell to pay debts, it pertains not to the Purchaſer in ſuch Caſes to enquire if the debts be ſatisfied, eſpecially when no Schedule of debts is made to ground his Enquiry on, elſe no ſuch Truſt could ever be executed.

3. But in this Caſe the Heir (who is intituled to the Lands after ſufficient is raiſed, to have the Lands by a Truſt implied, and a Truſt reſulting on conſtruction of the Truſt though not expreſt) both attach his Claim by exhibiting his Bill, and then no Man may purchaſe after the Bill Lite pendente: And when the Bill was exhibited againſt Henry Culpepper, the Truſtee, it will bind him and all claiming under him, pedente Lite; and it was improvident Councel to make Auſtin Party to give him occaſion to queſtion the Account, and however now the Account muſt go on. *Lis pendens.* *Nota*, No Proceſs then ſerved.

But I objected, that then it will lie in the power of the Heir to hinder or delay Sale or payment of debts, for he may exhibit a Bill when he will, and no Man can tell what the Event will be at the end of the Suit.

Anonymus.

Anonymus. 19 December 1676.

Parliament Privilege. Barons Widows. But 1676. resolved in the Lords House to the contrary, that the Widows had Parliament Privilege.

THE Lord Chancellor Finch declared, that it was lately resolved by the Lords in Parliament, that the Widows of Peers ought to have no Privilege of Parliament, because they are not to be called to Council; and cited the Lady Mohun's Case, though formerly they had been allowed it; but they are to have Privilege of Peers, not to be arrested.

DE

DE
Term. Sanct. Hill.
Anno Regis 28 & 29 Car. II.
In
CANCELLARIA.

Sims *contra* Urry. 15 January 1676.

THE Plaintiff had a Bond of 40 l. quadraginta libris, to pay 200 l. which should have been quadringentis. The Defendant was sued in Chancery as Heir and Executor to the Obligor, the Obligor having bound him and his Heirs. The Plaintiff had relief, though the Defendant offered to admit the Bond to be 400 l. and so try it.

40 l. Bond to pay 200 l. aided. The Heir charged, and charged here as by Judgment at Law he should have been.

The Lord Chancellor decreed an Account before a Master of the Profits of the Land from this time, viz. of the Decree, because the Defendant offered not so in his Answer, and at Law on Oyer, the Variance would appear: Yet the Defendant offered not to demand Oyer of the Bond at Law; but it was now too late objected, the Heir could not be bound but by writing, and this writing binds him but in 40 l. and the Executor could not pay it without a Decree, without a Devastavit to other Creditors.

Lord Chancellor. When the Plaintiff hath Judgment here, he shall have the same advantage as at Law.

Perkins *contra* Avery, Brown *and* Baker.

THeophilus Perkins, whose Executor the Plaintiff is, poſſeſt of certain Pieces of Hangings, put them into the hands of Avery an Upholſterer to ſell for him; but having occaſion for mony, deſired Brown, who was a Scrivener, to lend him 500 l. which he did on the Hangings, and enquired firſt of Avery, who was his Couſin and Neighbour, of the value of the Hangings, who informed him of the value: Afterwards Theophilus Perkins borrowed on the Hangings 100 l. more, and gave a Judgment alſo for the Debt with Intereſt, the Hangings being ſtill in Avery's hands, Avery ſold the Hangings at an under value, but whether Baker or Brown knew of the Sale? they pretended they did not, and denied that they knew: But Avery after his Sale deſired the Plaintiff, then Executor of Theophilus Perkins, to ſell them; who refuſed ſo to do unleſs he might firſt ſee them, but could not; the mony lent by Brown was Baker's, for whom Brown dealt as Scrivener, as they ſaid; but the Plaintiff, nor Theophilus Perkins his Teſtator, did not know thereof, nor did Baker appear therein, tho' the Securities were in his name: The Plaintiff paid the Mony and Intereſt; the Note for Judgment, and for the Mortgage of the Hangings, were always in Brown the Scrivener's cuſtody, and on payment of the mony delivered up to the Plaintiff: But the Hangings being ſold before, could not be had; and Brown ſaid he had nothing to do with Avery, (as one Witneſs depoſed at the payment, &c.) The Plaintiff exhibits his Bill to have the Hangings, or the value in mony. On a Trial againſt Brown, Baker and Avery, directed by the Court, the value of the Hangings was found to be 800 l.

The Lord Chancellor decreed the Defendants to pay the mony.

Brown and Baker petitioned to be re-heard, and that the Decree might be explained as to them only; that there was no reaſon to charge them, for they put not the Hangings into Avery's hands, but they were placed in Avery's hands with power to ſell them by Theophilus Perkins, and they ought not to be charged by Avery's default.

But

But my Lord Chancellor on long debate affirmed his former Decree; for by the Sale and Mortgage Perkins divested his Property, and the Goods became Baker's, and Avery became Truſtee for Baker, and he muſt anſwer for his Truſtee Avery, who did ſell them after the Mortgage.

And though Brown pretends to act as a Scrivener only, and as an Agent to lend Baker's Mony, they are to be looked on as one perſon as to the Plaintiff; for the Scrivener keeping the Securities for Baker, Baker truſted him thereby withal, and he had power to diſpoſe of the monies, and he undertakes the ſame by keeping the Securities, and ſhall be anſwerable as Baker: And now after the long Proceedings, Orders, Reports and Trials, and decree it is too late.

Anonymus. 23 February, 1676.

MR. Attorney moved, that a Decree pronounced in Michaelmas-Term, That the Defendant ſhould Account, ſince which the Defendant was dead, might be enrolled. Decree enrolled. *Poſt Mortem.*

(Lord Chancellor.) what good will that do you when 'tis but to Account?

(Mr. Attorney.) The Decree was not only to Account, but for payment of certain Sums.

(Lord Chancellor.) It hath been done, and is ſo at Law, if Judgment be pronounced it ſhall be entred, though the Party die, let it be ſo here now.

DE
Termino Paſchæ
Anno Regis 29 Car. II.
In
CANCELLARIA.

Craker & Ux. *contra* Parrott & Ux.

The Caſe on Proof.

Richard Spior, a Citizen of London, had Iſſue four Daughters, viz. the Plaintiff by his firſt Wife, and three Daughters by the Defendant his ſecond Wife; and by his Will devised in theſe words, (having given thereby ſeveral Legacies:)

As to the reſt of my Eſtate, One third part is due to my Children equally; therefore my Will is, that the Portions that I gave in advancement of my married Children, ſhall be accounted in their Shares to make their Shares equal with my unmarried Children; One other third part belongs to my Wife, and the other third part which I have power to diſpoſe; the Legacies by me given thereout deducted, I do intruſt my Wife with, during the time ſhe ſhall continue my Widow; and in caſe ſhe ſhall re-marry, I do will and deſire her to give unto my Children the Remainder of my Eſtate, according as ſhe ſhall think fit, **and dieth.**

The Widow marrieth again, the Remainder of the thirds after Debts and Legacies, was 1670 l. &c. The Executrix after her Marriage, by writing recites, that her Daughter Mary,

Mary, who had been married by her, and her former Huſband, againſt her own Inclination, and her the ſaid Mary's Husband left her one Child and no Maintenance, and was gone away; therefore he appoints to Mary 1074 l. to the Plaintiff 50 l. to the other two Daughters 257 l. apiece; ſo as Mary had 21 times as much as the Plaintiff, and the other two Daughters five times as much.

The Bill complains of this unequal Diſtribution, but was diſmiſt by Mr. Juſtice Jones; but an Appeal was now to the Chancellor, who re-heard the Cauſe, and ſet aſide the Diſtribution as done contrary to the Truſt which was repoſed in her by her Husband.

The Points debated at the Bar were;

1ſt. Whether the power left to the Wife was not determined by her Marriage, for the words are expreſs, that he intruſts her for ſo long time, viz. as ſhe ſhall continue his Widow; therefore ſhe having no power but by this Clauſe, ſhe cannot have the Power or Truſt longer than ſhe continueth his Widow.

To which it was objected, That her Power to diſpoſe was, if ſhe re-marry, to give, &c. ſo ſhe muſt re-marry, and then give, &c.

Reſp. The occaſion of diſpoſing is in caſe of Marriage, which ſhe may do before; as a power to limit a Jointure to a Wife may be executed before Marriage, if Marriage follow: And reaſon was for to truſt her no longer than while ſhe continued a Widow; for when ſhe married though ſhe might direct, yet all the Eſtate falls under the power of her Husband.

2dly. Admitting her power ceaſed not in point of time by her Marriage, yet ſo great Inequality ſhewed ſo much Partiality to her own Children above the other Child, the Plaintiff, to whom ſhe was a Step-mother, as that the Court ought to regulate it: Which it was urged the Court had power to do, and to diſpoſe, as the Father, if asked, would have done; and the rather in this Caſe, for that the Father when he publiſhed his Will, declared to his Wife what he had, and left her no charge but the Plaintiff, and ſhe ſaid ſhe would be kind to her, and deal with her as her own; and often in her Widowhood ſaid, the Children ſhould be equal.

This was much oppoſed, but my Lord Chancellor ſaid in effect, that he went on other Reaſons than were touched on at the Bar; he conſidered not the Caſe as matter of

Power.

Power, but as a Truſt in the Wife, which was to keep the Children in obedience to her while a Widow; but when ſhe ſhould marry, it was likely that the Reverence of the Children would not be ſo much as before; and therefore though he truſted her for the Children equally before, yet when ſhe ſhould marry he ſeems to give her a more arbitrary Power; but that doth not make the Children rightleſs.

Then was moved, there could be no Decree, becauſe the other Daughters were no Parties.

Reſp. They may come in before the Maſter, or however we deſire but that this Diſtribution may be ſet aſide.

D E

DE
Term. Sanct. Trin.
Anno Regis 29 Car. II.
In
CANCELLARIA.

Elliot *contra* Elliot. 3 July 1677.

THE Grandfather Mortgagee, purchaseth to himself the Equity of Redemption; and having two Sons, the eldest took ill Courses, and had killed a Man: The Grandfather and the Mortgagor joined in a Conveyance to Thomas his youngest Son, but no Consideration express, nor Trust express; but the Grandfather continued in Possession, and leased, received the Rents, and by his last Will devised the Lands to Thomas, but express not for what Estate, and died. Son trusted by the Father.

The Question was, Whether the Conveyance to Thomas should be taken to be in trust for the Grandfather, according to the usual Rule, or no? And the question arose between the Son of Thomas, and the Heir at Law.

Against the Heir at Law, and to make it no Trust:

1st. Where the Father purchaseth in the name of his Son, it hath been frequently decreed to be an Advancement and not a Trust, though the Father take the Profits and keep Possession; and though the Father after such Purchase declare the Trust, yet it is not good unless the Trust be declared before or at the time of the Purchase.

And so now the Lord Chancellor agreed.

2dly.

2dly. It was objected, that the reason why this Court had so as before decreed, was in pursuance of the reason of the Common Law: A Feoffment is made by the Father to the Son generally, no use riseth back to the Father, unless it be express.

3dly. The Will expressing no Estate, contradicts not the Rule; but one Witness doth expressly depose, that the Grandfather's Direction was to devise, &c. to Thomas and his Heirs: And another Witness deposed ad idem, to the best of his Remembrance, and as he believed, which was not prest as if such Parol Declaration could enlarge the Will, but as an Evidence of the Trust and Intent; and there was reason to do so, because of the disorder of the elder Son.

But the Lord Chancellor decreed it a Trust for the Grandfather, and took the Difference between a Son formerly married and provided for, and between a Son unprovided for. In the latter Case, if the Father purchased Land in the name of a Son, and pay for it, or convey Land to his Son, it shall be taken not to be a Trust ut supra, but to be an Advancement or Provision for the Son, because the Father is under an Obligation of Duty and Conscience to provide for his Child in such case; but after he hath provided for him, he is under no farther Obligation to provide more than for a Stranger, and else no Father could trust his Child: And this difference I take, and shall always observe, and the Trust is defective to alter the Case.

Anonymus.

Foreign Attachment.

EDward Turney was indebted to Edward Denham by Bond, and took of him divers Wares to barter and trade for in the East-Indies. Turney in his return homeward dieth Intestate, possest of divers Goods in the Ship. Daws possesseth himself of the Goods, and Mayor gets them into his Possession. Anthony Turney takes out Letters of Administration, and he brings a Bill, Hill. 1673. against Daws and Mayor to discover the Estate. 13 March 1673. Mayor enters a Plaint before the Mayor, &c. of London, against the Administrator, on a Bond for Mony, wherein Edward Turney the Intestate was bound to him, and hath Process thereon. The Officer returns that he had attached Anthony Turney

Turney by Goods (naming them) in the hands of Moyor, which were the Intestate's, and immediately Process on 14, 15, 16, 17, the same Days of the same Month of March, and the Goods condemned in four Days. Denham sueth the Administrator of the Intestate at Law, and by Nihil dicit obtains Judgment on the Bond. Daws doth the like on another Bond; but these Judgments were after the Judgment on the Foreign Attachment, and pending the Suit in Chancery by the Administrator: But Denham after exhibited a Bill against Turney the Administrator, and Daws; but Moyor was no Party to that Suit, and Daws had a Suit there against Turney, Moyor and Denham.

All three Causes came to be heard together: Decreed int' alia, for Daws and Moyor, to account for the Estate which came to their hands, Books, &c. to be brought in, the Estate, over and above just Allowances, to be distributed proportionably among the Creditors, according as by Law they ought to be paid, and that the Judgment in the Foreign Attachment should be set aside, but the Goods returned for Denham's Adventure, to be no part of Edward Turney's Estate. Moyor procures a Re-hearing, and insisted, that his Debt being by Bond, as well as the Debt to Denham and Daws, it was hard enough on him that the Judgment which he had on the Foreign Attachment was set aside, for he had therein done nothing illegal, and it was lawful for him to secure his Debt by any legal Course; but as the Decretal Order is penn'd, he shall not only lose the benefit of his Judgment, being first and precedent in time to the other Judgments, but shall lose his Debt; for the other Judgments will be preferred before his Debt by Bond, unless he may aid himself by his Judgment on the Attachment: But he declared, and was contented that this Judgment should not prejudice the other Debts, but all to be payed ratably and proportionably, so that he might have a Share of the Estate equally, according to the proportion of his Debt; but that as now the Order is penn'd, he will be wholly excluded till the Debts to Daws and Denham be paid, which may swallow the whole Estate.

Chancellor. If a Suit be begun in Banco Regis, Communi Banco, &c. no Foreign Attachment for a Debt, &c. shall prevent the Judgment of that Court, nor shall it

prevent the Judgment of this Court, &c. and therefore I confirm the Decree made, and set aside the Proceedings and Judgment on the Foreign Attachment: You forsook the High way and mistook it, and went in a By-way, therefore take your chance.

Decree against one who is not a Party.

Then it was objected, that the Administrator's Bill was not for payment of the other Debts, but only to discover the Estate, and Denham no Party to that Suit of the Administrators, and Moyor no Party to Turney covenant to pay the Administrators Bill; but Daws was, and Moyor no Defendant to the Bill of Denham, therefore he could not have any Decree against Moyor as now he hath.

Chancellor. They were all brought to hearing together, and reason was that it should be so; and on hearing of them, the Justice which was to be done on them all appeared, and accordingly decreed, and you shall not sever them now.

DE
Term. Sanct. Mich
Anno Regis 29 Car. II.
In
CANCELLARIA.

Hilliard *contra* Gorge, &c.

FErdinando Gorge, did by Articles ſealed to pay Hilliard the Plaintiffs Father 2100 l. for his Intereſt in a Plantation in Barbadoes, with Covenants to enter into ſeven Bonds for the Money, 300 l. each Bond. Gorge enjoyed the Plantation, but no Conveyance made to him; but Hilliard died, and made Speake and Hely Executors, in truſt for the Plaintiff an Infant. 600 l. was paid: Hely (Five of the Bonds being due) delivered them up, and takes Bonds of the ſame Sums in the name of himſelf, and his two Co-Executors, and excuſeth himſelf, becauſe Gorge had received a Commiſſion from the King to go to Suranam, &c. And ſo to mend the Security, he took five new Bonds; but by this 500 l. Intereſt was loſt to the Infant. Intereſt loſt decreed.

Lord Chancellor decreed the payment to be made according to the times of payment in the firſt Articles; and Gorge and Hely to be charged therewith, notwithſtanding that Hely had on taking the new Bonds releaſed Gorge of the Articles.

Bray *contra* Buffield.

Term devised to *A.* for life, and after to the heirs of the Body of *A.*

LEssee for Years devised the Lands to his Wife for her life, after her Death to the heirs of her Body, and for want thereof to J. S. and dieth. The Executor consents to the Legacy, the Wife dieth without Issue: The question was, Whether the Executor of the Husband or the Wife should have the residue of the Term?

(Pemberton.) Had the Devise been to the Wife, and the heirs of her Body, the whole Term had been hers, and any Remainder void, and the Executors could have had nothing; but it is devised to her for her life, and afterwards to the heirs of her Body; in which Case she hath but an Estate for her life, and after to her heirs, &c. Now the word (Heirs) is a good word of Purchase, and the heir of her Body shall take by way of Purchase: Put case the Devise had been to the Wife for life, and after to the heirs of a Stranger, there it should have vested when it fell, in the heir of a Stranger as a Purchaser.

(Resp.) I suppose he meant that the Stranger, to whose heir the Devise was made, was dead at the time of the Devise, or at least at the time of the Devisor's Death.

(Else quære.) And why not in this case, when a Will may be expounded two ways, and one way the Testator's Will and Meaning, will take effect, but not if the Will be expounded the other way, then that Exposition shall be taken, which best stands with the Testator's meaning; for the Wife shall have it for her life, and the heir after as a Purchaser; but the other way of Exposition excludes the heir: In case of a Freehold limited first to the Ancestor, and afterwards mediately or immediately; the word Heirs are a Limitation; for Heir and Ancestor succeed, but not heir and Testator of a Term, and the Remainder after the Limitation of an Intail, is void.

Lord Keeper e contra. The Testator meant an Intail to the Wife, which cannot be, because then there should be a Perpetuity of a Term; and though there be difference in words when Land of Freehold is devised to one for

for life, the Remainder afterwards to his Heirs, mediately or immediately; and where a Term is so devised, the difference is in words, the Testator's meaning is the same, and new Estates, Jointures and Settlements, are of long Terms, and a Similitude is between them, &c.

Anonymus. 21 Novemb. 1677.

THE Suit was for Tithes in Chancery: The Defendant being in contempt for not answering, was brought by several Orders to the Bar; and being indeed a Quaker, refused to answer on Oath, but prays to answer without Oath. *Pro confesso.* Tithes. Jurisdiction.

Lord Chancellor did admonish him of the Peril, viz. that the Bill must be taken for true, entirely as it is laid if he answered not; but he saying as before, the Chancellor pronounced his Decree, though Sir John Churchill not being of Councel, but Amicus Curiæ, said that this Cause for Tithes, especially small Tithes, was not proper for this Court, and had not been used.

Chancellor decreed for the Plaintiff, and refer'd the Valuation to the Master.

Manaton *contra* Squire. *The same Day.*

A Partition between Tenants in Common of a great Waste decreed, though many Reasons tending to great Inconveniences, viz. want of Pasture, Shade, &c. Tenants in Common. Partition.

Foster *contra* Denny. 4 Decemb. 1677.

The Case.

DUke the Father deviseth to his Wife, Mother-in-law to his Son, the Custody and Tuition of his Son, an Infant of about seven Years of Age and died: The Wife marries meanly, viz. her own Servant, and he dying, she married a very mean Person, Foster: The Uncle of the Boy gets possession of him, and sends him into France, where he placed him in a Protestant College for his Education. The Court on Information that the Child was eloigned by the Uncle, sued out a Writ of Homine replegiando, and this Day was appointed to hear why the Writ should not be discharged. Guardian. *Homine replegiando.*

Lord

Parliament.

Lord Chancellor. Where there is a Guardianship by the Common Law, this Court will intermeddle and order; but being here a Guardian by Act of Parliament, I cannot remove him or her, but in this, and all other the like Cases, they shall give Security not to marry the Child, infra annos nubiles, or consent, or be aiding to the Marriage of such, post annos nubiles, during Minority, without acquainting this Court therewith; but I cannot restrain the Infant from Marriage, ad annos nubiles, and the Uncle was ordered in this case to send for the Boy home, &c.

Anonymus.

Master of a Ship. Owner.

Merchant. Foreign Sentence.

A Master of a Ship, so appointed by B. Owner, treats with the Plaintiff to take the Ship to Freight for 80 Tuns, to sail from London to Falmouth, and thence to Barcelona, without altering the Voyage, and there to unlade at a certain Rate per Tun: And to perform this, the Master obliges the Ship, and what was therein, valued at 300 l. and accordingly a Charter Party was made and sealed between the Master and Merchant, but the Owners of the Ship no Parties thereto: The Master deviates, and commits Barratry, and the Merchant in effect loseth his Voyage and Goods; for the Merchandize being Fish came not till Lent was past, and was rotten: The Merchant's Factor hereupon sueth the Master in the Court of Admiralty at Barcelona, and upon an Appeal to a higher Court in Spain, hath Sentence against the Master and Ship; which coming to his Hands, viz. the Merchant's Hands, the Owner brings an Action of Trover for the Ship; the Merchant sueth in Chancery to stop this Suit, and another Suit brought by the Owner for Freight, claiming Deduction out of both for his Damages sustained by the Master by breach of the Articles by the Master; for if the Owner gives Authority to the Master to Contract, or doth allow his Contract, he shall be liable to Loss, as well as Gain, by occasion of that Contract; and if he will have the Gain, viz. the Freight by the Master's Contract, he shall also bear the Loss; and a Contract made by my Councel is as if I make it my self. Indeed in case of Bottomry after a Voyage begun, the Master cannot oblige the Owner beyond the value of the Ship, but this Case is, ut supra, on Contract.

Lord

Lord Chancellor. The Charter Party values the Ship at a certain Rate, and you shall not oblige the Owner further, and that only with relation to the Freight, not to the value of the Ship; the Master is liable for Deviation and Barratry, but not the Owners, else Masters should be Owners of all Mens Ships and Estates.

Keck. If the Owner had been Party to the Charter Party, and covenanted there should be such Proceedings in the Voyage, he should on Non-performance thereof have been liable to the Damages, and the Valuation of the Ship in the latter Clause, viz. obliging the Ship to the performance, would not excuse or lessen the Damage, and the Owner by assenting to the Act and Agreement of the Master obligeth himself.

Lord Chancellor decreed ut ante.

The Lady Mary Cope's *Case.*

Lunatick.

THE Lady Mary Cope was found a Lunatick, and on Inspection found so, was committed to Mr. Guy, at the Request of the Countess of Bath; and now Sir Francis Fane her Uncle, and Aunt, their Sister by the half Blood, petitioned the Lord Chancellor for the Custody; first, for that she was nearest in Blood; the Estate was but a Jointure for Life, so as no Impediment, as in case of Guardianship where Lands may descend: And Nearness of Blood argueth most nearness of Affection; especially Guy being a Stranger: And she could not be thought to design against the Life of the Lunatick, and she on her Death was best intituled to the Administration of the Estate, and consequently most engaged for the Preservation of it.

Lord Chancellor. It's no question of Right, but of Prudence; and where no Right, there is no Wrong: It shall never in this or any case be committed to any that will make gain of it; and the Sister though she be not intituled to the Estate, yet is concerned to out-live her, for thereby she will be intituled to the Estate, and therefore settled it as before; adding, that the Sister should be called to the yearly Account before the Master.

Then

Then we preſſed that Mr. Guy might be ſtinted, beyond which he might not exceed.

Chancellor. Move that when the Account is made, then the certainty of the Eſtate will beſt appear; the Allowance muſt be liberal and honourable.

DE
Term. Sanct. Hill.
Anno Regis 29 & 30 Car. II.
In
CANCELLARIA.

Taylor *contra* Rudd. 5 Febr. 1677.

THE Defendant, four days after her Husband's death, was asked by the Plaintiff, whether she would marry again? and he gave her a Guinea to have ten Guinea's for it if she married again. And now she being married, the Plaintiff sued her and her Husband to discover the Promise. Catching Promise.

On Demurrer it was insisted on by Sir J. Churchill and others, that it was a Catching Promise, and like to a Wager, which this Court will give no help at all unto, and was gained from her in her Sorrow, and ten for one is not a conscionable Bargain.

(Jones Attorney.) The difference is where it is a Bond Penal, whereon the Jury can give no less than the Penalty, and this Case, where the Jury will as cause is, lessen, &c. The Demurrer was over-ruled, and the Defendant to answer.

Atterbury *contra* Hawkins, &c.

Scrivener not privileged.

TWO Brothers, in the life of their Father, (R. Jason) agreed by Articles together, That if the Father should leave or convey his Estate to the eldest, he should convey a third part thereof to the younger Son; and if he should convey, &c. to the younger Son, then the younger Son should convey a Proportion, &c. to the elder. The Plaintiff pretends himself by this Bill to be interested in this Agreement under the younger Son, and Hawkins one of the Defendants is charged to know and to discover Incumbrances on the Estate made by the Father, &c. Hawkins demurs, because he was a Scrivener, and knew nothing but as a Scrivener when employed in lending Mony, and taking Securities from the Father, &c. and demanded Judgment if he should discover, &c. insisting that it was a general Case concerning all Scriveners, and all Dealers with them, in lending and borrowing of Monies. The Demurrer was over-ruled, and Hawkins put in an Answer. To which Answer Exceptions were taken, and now came to be heard. The Defendant Hawkins hath now set forth in his Answer the Names of the Persons for whom he dealt in this Affair, namely the Bishop of Salisbury and others; so as the Plaintiff might make them Parties who are the Parties concerned in Interest; but he himself disclaimed all Interest, but did not answer what Conveyances he had made, nor for what Sums.

And it was said by Mr. Attorney, Mr. Keck, &c. That this would be a foundation of a Practice of very ill consequence, viz. when that the Party concerned may defend himself, so as coming in by valuable consideration and without notice, he should not be compelled to discover any thing to prejudice or weaken his Title, if he were himself Party to the Bill; yet by a Bill against his Agent, (for a Scrivener in such case is no other) he shall have every thing discovered: And it was said, that the Plaintiffs design was, and his endeavour had been to buy in some Incumbrances precedent to the Assurances made to his Clients, (so he called his Employers:) Besides, the Defendant having disclaimed, the Plaintiff could have no Decree against him, nor any Advantage by his Answer; for no use thereof can be made against any others, and therefore it were better and more proper

proper to make the other Persons, whose Names are discovered in the Answer, Parties, and put them to answer for themselves than the Scrivener, no way interested, but as an Agent for others; and by this way a Man that is a meer Stranger in Interest, and knows only as a Witness, may be drawn in to answer a Bill, and so either prepared to be a Witness, or searched by his Oath what he can say, &c.

(Sollicitor.) By the Order on hearing the Demurrer, the Defendant was to answer, and to discover, but now would bring the same matter into debate again.

Chancellor. The Bill is for discovery, and in effect the Defendant bids the Plaintiff go look; therefore answer what Conveyances himself made, not to the former.

DE
Term. Sanct. Trin.
Anno Regis 30 Car. II.
In
CANCELLARIA.

Anonymus.

Redemption bar'd, but no Poſſeſſion to be decreed.

A Mortgagee ſues to have his Mony, or that the Defendant be barred of Equity of Redemption. It happened that by ſubſequent Orders poſſeſſion was ordered to the Mortgagee, and Contempt proſecuted for not delivering the Poſſeſſion; and the Heir who was ſo proſecuted, ſet forth in his Examination a Title: And now the Mortgagee would have debated the Title, but not admitted becauſe the Courſe of the Court is, and the Court can go no further in ſuch a Bill but to take away the Equity of Redemption, and leave the Plaintiff to ſuch Title as he hath, but not to amend it; and this was the true and antient Courſe, though of late ſome times the contrary hath been done.

And now the Lord Chancellor agreed thereto, and diſcharged the Contempt.

Sir

Sir Robert Henly *contra* —— 12 June.

DEcreed if a Guardian to an Infant, whose Lands are incumbred with Arreats of Rent to the value of 600 l. and he hath in his hands of the Infant's Estate 100 l. and buyeth the 600 l. he shall not charge the Infant with the 600 l. Guardian not advantaged by Bargain.

A Writ of Ne exeat Regnum granted in any Case where there is danger of Subterfuge from the Justice of the Nation, though of private concernment.

DE

DE
Term. Sanct. Mich.
Anno Regis 30 Car. II.
In
CANCELLARIA.

Moore *contra* Bennett. 14 December 1678.

Notice implicite.

A. Makes a Conveyance to B. with power of Revocation by Will, and limits other uses if A. dispose to a Purchaser by the Will: Another Purchaser subsequent is intended to have notice of the Will as well as of the Power to revoke, and this is in Law a notice: And so it is in all Cases where the Purchaser cannot make out a Title but by a Deed, which leads him to another Fact, the Purchaser shall not be a Purchaser without notice of that Fact, but shall be presumed cognisant thereof; for it is crassa negligentia, that he sought not after it.

DE
Term. Sanct. Hill.
Anno Regis 30 & 31 Car. II.
In
CANCELLARIA.

Wakelyn *contra* **Warner.** 13 February.

A Man seised in Fee devised Portions to several of his Children or Friends, payable at several times by 50l. per Annum, with which Sums he charged his Lands so be thereout paid, and died. 50l. one payment incurred due; then the Lands were alien'd by Fine, with Proclamations, five Years past; The Devisee sueth here for the whole, and the Decree was for the Plaintiff, for what grew due after the Fine was barr'd by the Fine, but not the 50l. due before; for a Trust is barred by Fine, &c. Fine bars Equity.

Warren *contra* — — —

GEorge Warren mortgaged a House in Exon for 3000 Years to Boughton, in trust for Francis, Arthur. George died, Thomas his Son took Administration to George, and Francis died, and Hester took Administration to him; Thomas Administrator to the Mortgagor sueth Hester Administratrix of Francis; and Boughton to redeem Hester, pleads that it was no Mortgage, but an absolute Purchase; but the Plea was set aside on hearing, December and January 1677. On Re-hearing the Court decreed Inrollment staid. *Post Mortem.* Administrator obtained. Decree; and dies Intestate

decreed the Eſtate redeemable, but there being other mutual Demands, the Eſtate was by Decree to be convey'd by Heſter, and Boughton the Truſtee, to the Six Clerks to be under Diſpoſition of the Court, and a Security of what ſhould be due on the mutual Demands, and Bills to be exhibited for clearing theſe Demands, and a Maſter to take the Account of the Mortgage.

The Maſter took up the Account, and certifies the Mortgagee over paid by Profits 280 l. which was now due to Thomas.

In October 1678. the other Cauſes coming to be heard, the Plaintiff Thomas made a Propoſition that he would quit the 280 l. ſo as Heſter and Boughton would aſſign the Term and all their Intereſt therein to him, his Executors and Adminiſtrators. Heſter in perſon takes time to conſider, and then conſents; and the Court by conſent of her and her Councel, and of the Plaintiff Thomas, decrees her quit of the 280 l. and to aſſign to Thomas, his Executors and Adminiſtrators, and Boughton to join, and Thomas to releaſe to Heſter and her Heirs his Right, in certain Iriſh Lands.

Before Inrollment Thomas dieth, his Wife takes Adminiſtration to him, and now moved that the Decree might be inrolled, viz. 15 Jan. ſo as there was no Laches; for there hath no Term paſſed ſince October laſt, when the Decree was pronounced, and the Decree is the Act and Judgment of the Court, the Inrollment the Clerk's buſineſs, and the Decree is, that the Land be conveyed to Thomas, his Executors and Adminiſtrators, which the Wife now is.

It was oppoſed;

Firſt, Becauſe Thomas had right but as Adminiſtrator to George, which the Wife of Thomas cannot have as Adminiſtratrix to Thomas.

Secondly, The Releaſe cannot now be had to Heſter, for ſhe is Heir to Francis, and George and Thomas.

The Lord Chancellor denied the Inrollment, for the Title of Thomas as Adminiſtrator is gone.

Then 'twas prayed, ſeeing that now the Adminiſtrator by Suit of Thomas hath benefit, Conſideration be had of Thomas his Coſts, but denied.

Everard

Everard *contra* Warren.

THE Defendant on account ſhould be diſcharged by his Oath of Sums under 40 s. but a Party ſhall not by way of Charge, charge another perſon ſo.

Everard, Owner of ſome parts of a Ship, took up ſeveral Sums of Mony on Bottomry: The Defendant became bound with the Plaintiff for the Mony; the Plaintiff furniſhed the Ship with Merchandize: The Defendant takes the Ship and Goods, and employs them.

Brown *contra* Hamond. 18 January 1678.

THE Plaintiff ſets forth, That he was ſeiſed of 300 Acres of Land in the Fens, which he demiſed to Alliſon at 50 l. Rent for two Years, and after at 60 l. Rent. The Leſſee covenants to pay all Taxes, 30 l. Tax was impoſed, and 3 l. Penalty incurred: The Leſſee having ſufficient Rent in his hands to pay the 33 l. combined with the Defendant, one of the Conſervators, to defeat him of his Inheritance, and forbore to pay the 33 l. The Officers appointed to ſell by the Laws of the Fens, ſell 100 Acres of the 300 for the 33 l. to the Defendant, a Commiſſioner: whereas the 100 Acres were worth 400 l. to be ſold.

Fens. Unreaſonable Sale not relieved.

The Defendant denieth Combination, and pleads to the reſt the Statute of Draining, and that the Sale was made according to and by virtue of thoſe Statutes.

The Lord Chancellor allowed the Plea, for he could not relieve contrary to an Act of Parliament, and if he ſhould it would deſtroy the whole Oeconomy of the Preſervation of the Fens; and compared it to the Caſe of a Mortgagor of Houſes in London of great value, that ſhould be ſettled by the Judges, according to thoſe Acts made concerning London to be rebuilt; This Court ſhall not examine any Sale on pretence of Equity.

Note. The Sale is made four Months after default of payment, twice in the Year, and their uſe is to expoſe firſt ten, or fewer or more Acres for the Sum in arrear, and ſo increaſe till a Chapman offer, &c. and never ſell for more than what is in arrear of the Tax and Penalty, and it ſeems can ſell for no more.

Anonymus. 21 January 1677.

Examination in Chancery uſed in Delegates.

On Appeal between Gargrave *alias* Fan, *and* — —

THE Judges and Civilians on debate ruled, that the Teſtimony of one Nevill, who was examined in Chancery between the ſame Parties, and croſs-examined there, ſhould be read before the Delegates; though it was objected, that the Appellant here ſhould take the advantage here, which he ſhould have had if he had been croſs-examined; for croſs examining a Witneſs ſets him upright in Chancery, but not here.

Shuter *contra* Gilliard.

THE Defendant was Servant and Kinſman to Mr. Shuter of the Inner-Temple, deceaſed; and marrying the Daughter of Harriſon, Shuter promiſed to give or leave to the Defendant as much in Mony or value, as Harriſon did or ſhould give in Portion to him, and made his Wife Executrix, and died. The Defendant ſued the Wife, &c. on the Promiſe; the Wife exhibited her Bill to diſcover the truth of the Promiſe, (for it was, if any, a very unlikely one; for Harriſon might give 5000 l. or more) and to diſcover what Harriſon did give, and found that in truth he had given little, and prayed relief on the Bill; but the Defendant proceeded to trial, and the Promiſe being a Collateral Promiſe, and not for Shuter's own debt, and being made but a ſhort time before the Statute of the 24th of June 1677. a ſpecial Verdict was found on that matter, and therein it was alſo found that Harriſon had given in Mony and Value 2000 l. and 2000 l. Damages aſſeſt.

Verdict.

There-

Thereupon the Executrix prayed to amend her Bill, and having order so to do, set forth her Verdict, and alledged that the Plaintiff Gilliard made up the value by Jewels, valued and by a Mill which was valued at 1000 l. and was but 30 l. per Annum, and worth to be sold or otherwise, but 400 l. and now prayed relief. To which the Defendant pleaded the Verdict, and that thereby the Promise was found and damages, and that Harrison had given pro ut.

On hearing the Demurrer and Plea, the Plea was allowed, and that no Examination should be had as to the value of what Harrison had given: Notwithstanding the Plaintiff here examined to the value of what Harrison gave, but the Defendant here, as was said in regard of the Order, did not examine thereto, and so should be surprized, insisting on the Verdict, which expresly found the value, &c. Examination.

To which it was alledged, that the main Defence being the Matter in Law, they ought not to be concluded by the other Matter, and offered to read proof to such effect.

Lord Chancellor. Where there is Right and Equity, Forms of the Court and Orders shall not hinder me to examine it; and it was so ordered.

THE

ERRATA.

PAge 29. l. 3. for *whole* read *hold*. P. 33. l. 1. add. and *Eyres* contra *Jason*. P. 35. l. 14. r. *precedent*. P. 82. l. 21. for *Commissioner* r. *Commissary*. P. 91. l. 14. r. *every Alience*. P. 106. l. 34. for *Plaintiff* r. *Defendant*. P. 109. l. 6. after *Plaintiff* r. *for life*. P. 110. l. 24. dele *Plaintiffs*. P. 111. l. 36. r. *the Testators Estate*.

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